89-1917

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RICK KAY, ROBERT FOX, ROBERT CAVALIERI, MICHAEL ILITCH, PROPHET PRODUCTIONS, LTD., MICHAEL TINIK, OLYMPIA ARENAS, INC.,
Petitioners,

v.

CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether there is a *per se* rule that a judgment in one action can never have claim preclusive effect with respect to conduct occurring subsequent to the first action?

LIST OF PARTIES AND RULE 29 DISCLOSURE

The parties before the Court of Appeals and this Court are listed in the caption. The corporate Petitioners have no parent or subsidiary companies.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RICK KAY, ROBERT FOX, ROBERT CAVALIERI, MICHAEL ILITCH, PROPHET PRODUCTIONS, LTD., MICHAEL TINIK, and OLYMPIA ARENAS, INC. petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A) is reported at 897 F.2d 1375 (1990). The opinions of the District Court (App. D, F, H) are not reported.

JURISDICTION

The judgment of the Court of Appeals (App. C, p. C-1 - C-2) was entered on March 8, 1990. Pursuant to Supreme Court Rule 13.1, this petition is timely filed on or before June 6, 1990. Jurisdiction of this court is invoked under 28 USC 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS AND REGULATIONS INVOLVED

This case involves the federal common law of *res judicata.* It does not involve any specific constitutional provision, treaty, statute, ordinance, or regulation.

STATEMENT OF THE CASE

The facts material to this petition are uncontested. Petitioner Olympia Arenas, Inc. ("Olympia") operates the Joe Louis and Cobo Arenas, two facilities in Detroit, Michigan, under an exclusive master lease agreement with their owner, the City of Detroit. Petitioner Prophet Products Ltd. ("Brass Ring") is a concert promoter in the metropolitan Detroit area. In early 1983, Olympia and Brass Ring entered into an arrangement under which they agreed to co-promote live musical concerts at the two arenas. Respondent Cellar Door Productions, Inc. of Michigan ("Cellar Door"), which is another concert promoter in the metropolitan Detroit area, sought access to the arenas under the same co-promotion arrangement that Olympia made with Brass Ring. Olympia denied this request.

In June of 1983, Cellar Door commenced an action in the United States District Court for the Eastern District of Michigan, naming as defendants Olympia and Brass Ring.[1] The Complaint alleged that the Joe Louis and Cobo Arenas were essential facilities for the promotion of arena attractions, and therefore, the arrangement between Olympia and Brass Ring violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. Section 1, *et seq.* (The Sherman Act) (App. K, p. K-6). The Complaint asked for preliminary and permanent injunctive relief against the exclusive arrangement, and money damages. (App. K, p. K-7-K-8). The 1983 Complaint specifically alleged that "The conduct of Defendants. . . (had) recently just begun, is continuing and will continue

[1] A non-existent entity referred to as "Olympia Stadium Corporation, a Michigan corporation" was also named a party defendant (App. K, p. K-1).

unless the injunctive relief as requested herein is granted." (App. K, p. K-5).

After filing the 1983 action, Cellar Door moved for a preliminary injunction against the exclusive arrangement. The District Court denied its motion on August 1, 1983, holding that Cellar Door did not have a strong likelihood of success on the merits because the two arenas did not appear to be essential facilities for the purposes of the Sherman Act. Cellar Door took no future action with respect to the 1983 action, except to enter into a stipulation dismissing the action "with prejudice". On November 7, 1983, the District Court entered an order in conformity with the stipulation, which provided:

> IT IS HEREBY ORDERED that the above captioned matter be and the same hereby is dismissed with prejudice and without costs to either party. (App. J, p. J-3).

Thereafter, Petitioners continue to co-promote concert events at the Joe Louis and Cobo Arenas. Respondent Cellar Door likewise continued to promote concerts in the metropolitan Detroit area.

On February 5, 1987, Cellar Door commenced this action, also in the United States District Court for the Eastern District of Michigan. The 1987 Complaint named as defendants Olympia and Brass Ring, along with the other Petitioners[2] and certain unrelated parties[3] Like the 1983 Complaint, the 1987 Complaint alleged that the arrangement between Olympia and Brass Ring violated Section 2 of the Sherman Act. (App. L, p. L-9). Also like the 1983 Complaint, the 1987 Complaint asked for

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[2] The remaining Petitioners are the individual principals of the respective corporate Petitioners. (App. L, p. L-5).

[3] The actual caption of the case was *Cellar Door Productions, Inc. of Michigan v. Rick Kay, Robert Fox, Robert Cavalieri, Charles Forbes, Michael Il[l]itch, Olympia Stadium Corporation, a Michigan corporation; Olympia Arenas, Inc., a Michigan corporation; Prophet Productions Ltd., a Michigan corporation, Michael Tinik, Vincent Bannon, and The Building Group, City of Detroit.*

permanent injunctive relief. (App. L, p. L-11). Finally, like the 1983 Complaint, the 1987 Complaint sought money damages. (App. L, p. L-11). The 1987 Complaint made no allegations of unlawful activity by the Petitioners, other than conduct in furtherance of the exclusive co-promoting arrangement that was the subject of the 1983 action.

Pursuant to a motion, certain of the defendants had the action re-assigned to the Hon. Anna Diggs Taylor, the trial judge who had sat on the 1983 action.[4] Brass Ring moved for summary judgment on the ground that the dismissal of the 1983 action precluded the later claim under the doctrine of *res judicata*. At a hearing on September 21, 1987, the District Court granted this motion, stating that "there is 1 common nucleus of facts in the entire set of litigation of (the) 2 pieces of litigation," and that therefore "no new cause of action" had arisen since the prior suit. (App. D, p. D-3). Pursuant to its oral decision, the District Court entered an Order Granting Summary Judgment on October 16, 1987. (App. E, p. E-3). Thereafter the other petitioners respectively filed for summary judgment claiming the benefit of the *res judicata* doctrine. The District Court likewise granted these motions by successive oral opinions on October 19, 1987, and entered respective orders of summary judgment on October 29, 1987. (App. G, p. G-3; App. I, p. I-3).

Respondent took a timely appeal against Petitioners to the United States Court of Appeals for the Sixth Circuit. In a decision issued March 8, 1990, the Court of Appeals reversed the District Court's grant of the summary judgments. The Court of Appeals declared that *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), "is controlling", (App. A, p. A-3) and held that, "Each time the arrangement precluded Cellar Door from

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[4]In filing the 1987 action, the Respondent failed to make proper disclosure under Local Court Rule 8(c)(3)(ii) in denying on the cover sheet inquiry that the cases have substantially similar evidence. The Lower Court determined that this should have been answered in the affirmative and in this regard upheld the District Court's order of sanction. (App. A, p. A-9).

competitively bidding for an event, a cause of action may have accrued to Cellar Door". (App. A, p. A-6).

This petition followed.

BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

The District Court had jurisdiction under 28 U.S.C. Section 1337, because this is a civil action arising under The Sherman Act 15 U.S.C. 1, and under principles of pendent jurisdiction.

REASONS FOR GRANTING THE PETITION

THERE IS NO *PER SE* RULE THAT A JUDGMENT IN AN ACTION CAN NEVER HAVE CLAIM PRECLUSIVE EFFECT WITH RESPECT TO CONDUCT OCCURRING SUBSEQUENT TO THAT ACTION.

A. Determining The Bounds Of A Claim For *Res Judicata* Purposes Is A Question Of Vital Significance Which Warrants Guidance From This Court.

As this Court declared in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981), *res judicata* is a rule of fundamental justice that "... should be cordially regarded and enforced by the courts." This is a principle that is "even more compelling in view of today's crowded dockets." As demonstrated *infra*, its application relates " ... to all kinds of litigation" and is "... applied to every category of cases." *Walsh v. International Longshoremen's Association AFL - CIO, Local 779*, 630 F.2d 864 (1st Cir. 1980). In recent years, the Court has addressed a variety of important issues in the area of *res judicata*, including the scope of intersystem preclusion, *Marrese v. American Academy of Orthopedic Surgeons*, 407 U.S. 373 (1985), and of privity, *Montana v. U.S.*, 404 U.S. 147 (1979), and the question of when mutuality is required for estoppel, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 407 U.S. 313 (1971). The Court has, however, given very little guidance in the recent

past to what must be considered the most fundamental question: How should the scope of a claim be ascertained for purposes of determining the claim preclusive effect of a judgment.

This case presents an important aspect of that core question: How should the scope of a claim be ascertained with respect to a continuing practice? This question arises in antitrust cases such as this one, *Engelhardt v. Bell & Howell Co.*, 327 F.2d 30 (8th Cir. 1964), and also in such diverse areas as civil rights, *see: Commonwealth of Pennsylvania v. Brown,* 260 F. Supp. 323 (E.D. Pa. 1966) *Aff'd,* 392 F.2d 120 (1968), patent infringement, *see: The Young Engineers, Inc. v. United States International Trade Commission,* 721 F2d 1305 (Fed. Cir. 1983), contract law, *see: Peugeot Motors of America, Inc. v. Eastern Auto Distributors, Inc,* 892 F.2d 355 (4th Cir. 1989), and labor relations, *see: Walsh v. International Longshoremen's Association AFL-CIO, supra* — indeed, in any area in which a plaintiff brings an action for the purpose of determining the illegality of a given continuing practice.

The need for guidance on this question is particularly urgent because thirty-five years have passed since this Court's decision in *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), the decision deemed "controlling" by the Court of Appeals in this case (App. A, p. A-3). In the intervening years, the law of *res judicata* — and in particular the analytical approach to the determination of claim — has been dramatically transformed. It is, therefore, important that the federal courts be directed by a current expression of this Court's opinion on the subject.

We emphasize at the outset that we do not find the outcome of *Lawlor* irreconcilable with our position, and we do not seek to have that decision overturned. Indeed, if read broadly, as we think it should be, most, if not at all, of the language of *Lawlor* is compatible with the modern, pragmatic approach to claim preclusion. But *Lawlor* is also capable of the narrow, inflexible interpretation placed on it by the Sixth Circuit. Thus, as we will demonstrate in Section B, it has bred conflict and confusion in the lower courts. Guidance from this Court is necessary to resolve the

conflicts, and to encourage federal courts to give ventilation to the modern approach of claim determination.

B. The Court of Appeals' Holding Establishes A *Per Se* Rule Which Is In Conflict With The Better View Of *Lawlor* And With The Law Of Other Circuits, That A Judgment In One Action Can Never Have Claim Preclusive Effect With Respect To Conduct Occurring Subsequent To The First Action.

1. The Court Of Appeals' Per Se Interpretation of Lawlor.

The decision of the Court of Appeals in this case was based on the proposition that a judgment in one action can never have claim preclusive effect with respect to conduct occurring subsequent to that action. That proposition was necessary to the Court of Appeals' holding because, as acknowledged by the Respondent, the *only* material difference between the present action and the 1983 action was the time period involved.[1]

The Court of Appeals held that the element of time was preemptively dispositive on the issue of the similarity of claim. Relying on this Court's opinion in *Lawlor*, the Lower Court unequivocally held that "a suit based upon a course of wrongful conduct occurring subsequent to the judgment in the prior suit is not based on the same but on a different cause of action", *quoting United States v. General Electric Co.*, 358 F. Supp. 731, 740 (S.D.N.Y. 1973) (App. A., pp. A-4–A-5). The Court of Appeals interpreted *Lawlor* to create a *per se* rule that time is the exclusive test in determining what is a single cause of action for *res judicata* purposes. Under such a rule, a plaintiff, by bringing

[1]This was dramatized in the original argument in the District Court when the attorney for the Respondent argued:

> MR. KRAMER: The only difference — and this was critical and determinative, as it will be here — is that different time periods were alleged. And as Chief Justice Warren — and I won't bother to read it because Your Honor has it before you — said, "Different time periods, end of issue, . . ." (App M., p. M-3)

an action, effectively draws an absolute time boundary to its claim, so that in no circumstances may an action seeking a remedy for later conduct be precluded.

In *Lawlor*, the plaintiffs brought an action alleging a conspiracy to monopolize the distribution of advertising posters to motion picture exhibitors. In 1943, before trial, a settlement was reached, and the action was dismissed with prejudice. As summarized by the Court below the plaintiffs brought another action in 1949,

> . . . this time alleging that the prior settlement was merely a device used by the defendants to perpetuate their conspiracy and monopoly. Plaintiffs also alleged that five other producers had joined the conspiracy since the 1943 dismissal, that defendant National Screen had deliberately made slow and erratic deliveries of advertising materials in an effort to destroy plaintiff's business, and that defendant had used tie-in sales and other means of exploiting its monopoly power. (App. A, p. A-3).

This Court held that the 1943 dismissal did not preclude the 1949 action. In reaching that holding — this Court observed: "While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." 349 U.S., at 327. The decision did not rest there, however. It pointed to the facts that "[i]n addition, there are new antitrust violations alleged here" and that "[i]n the interim, moreover, there was a substantial change in the scope of the defendants' alleged monopoly." *Id.* at 328. Additionally, the *Lawlor* opinion dedicated two footnotes describing changed circumstances from the prior action, the first dealing with the alleged tie-in practices, and the second describing the pertinence of the enlarged monopoly. 349 U.S. at 325 n.1, 328 n.5.

According to the Court of Appeals in this case, however, adopting wholesale the conclusion of the *General Electric* decision — "[I]n addition" and "moreover" — indicate that these factors

were merely surplusage, and not essential to this Court's holding. Instead, the Court of Appeals used the earlier-quoted sentence to construct a *per se* rule that a course of conduct subsequent to the first judgment is part of a different cause of action for *res judicata* purposes.

The Sixth Circuit appears not to be alone in recognizing this *per se* rule. *See, e.g., Page v. United States,* 729 F.2d 818, 819-820 (D.C. Cir. 1984) *Joseph Muller Corp. Zurich v. Gazocean International, S.A.*, 394 F. Supp. 1246, 1248-1249 (S.D.N.Y. 1975). Nevertheless this interpretation is squarely in conflict with the better view of *Lawlor* and with decisions of other circuits.

2. The Better View of Lawlor

The *Lawlor* Court said: "That both suits involved 'essentially the same course of wrongful conduct' is not decisive." 349 U.S. at 327. The Court did *not* say that such congruity cannot be a *factor* in determining the preclusive effect of the first action and the clear implication of the "not decisive" language is that such congruity can indeed be such a factor. The Court said further that "such a course of conduct — for example an abatable nuisance — may frequently give rise to more than a single cause of action." *Id.* at 328. But this Court did *not* say that such a course of conduct *always* gives rise to more than one cause of action, and the clear implication of the "may frequently" language is that *infrequently* it does not.

It is in this light and in the context of the litany of "new antitrust violations alleged" that one must understand *Lawlor's* statement that the prior judgment "cannot be given the effect of extinguishable claims which did not even then exist and which could not possibly have been sued upon in the previous case." *Id.* at 327. Clearly, in *Lawlor,* the new conduct which arose out of the settlement, was not foreseeable at the time of the first action, and, accordingly, could not have been the subject of the earlier action. But that is not always true. In some cases, it is clear that one *can* sue to remedy injury that has not yet been suffered or conduct that has not yet occurred. Similarly, in some cases of continuing

or recurrent torts, where it appears that the torts will continue indefinitely, a plaintiff may recover damages for the future violations in the same action as that for the past violations. *See: Restatement (Second) Torts,* Section 930(1). Indeed, in some cases, the plaintiff "*must* recover for both past and future invasions in the same action." *Id.* Section 930(2) (emphasis added). Thus, the *Lawlor* Court's statement should not be read as creating a *per se* rule that injury suffered after the first action, or attributable to conduct arising after the first action, always gives rise to a new claim.

3. Conflict Between the Sixth Circuit and Other Circuits.

Not surprisingly, other circuits have rejected the Sixth Circuit's *per se* rule. Indeed, the Court of Appeals in this case acknowledged, (App. A. p. A-5), that its interpretation of *Lawlor* conflicts with that of the Eighth Circuit in *Engelhardt v. Bell & Howell Co., supra.* In *Engelhardt,* as in this case, a prior attempt to bring the same antitrust claim (a continuing refusal to deal) had been dismissed with prejudice. The Plaintiff argued that "even if there is claim preclusion as to all the damages he has sustained up and through the prior actions, he is still entitled to recover for future damages on the ground that there is a continuing conspiracy which creates new causes of action with each invasion of Plaintiff's interest." *Id.* at 35. The Eighth Circuit squarely rejected this argument, and in doing so held that *Lawlor* was "readily distinguishable":

> In Lawlor five new defendants were brought into the case in the new action. Substantial new antitrust violations subsequent to the termination of the prior litigation were charged. In our case the parties in all actions are identical and only continuing violations of the type involved in the prior actions and there adjudicated against the plaintiff are asserted. *Id.* at 36.[2]

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[2]The attempt by the Court of Appeals in this case to distinguish *Engelhardt* as involving "a single breach of contract, only one refusal to deal and only a

The Eighth Circuit's decision in *Engelhardt* does not stand alone in rejecting the Sixth Circuit's *per se* rule. In a very recent case, *Peugeot Motors of America, Inc. v. Eastern Auto Distributors, Inc., supra*, (1989), the Fourth Circuit has done the same. In prior litigation, Eastern had brought claims against Peugeot under the federal Dealer's Day in Court Act and for breach of contract. In the subsequent litigation, initiated by Peugeot, Eastern attempted to assert counterclaims to the similar effect, including an allegation that Peugeot was engaged in a "continuous, unfair, and inequitable scheme" to drive Eastern out of business. The Fourth Circuit noted that:

> Eastern alleged virtually the same thing in the 1981 complaint: that since 1978 Peugeot engaged in a whole range of activities with 'intent to coerce, intimidate' and force Eastern out of business. Both of these counterclaims involve many of the same facts actually litigated in the prior suit. *They do, however, contain events that occurred after the 1981 suit.*" *Id.* at 359 (emphasis added).

This was not enough to prevent preclusion of the claims however, as the Fourth Circuit held: "We do not believe that the mere fact that Peugeot's questioned policies continued after the 1981 litigation allows Eastern to make the same legal claim about the same policies that were litigated and on account of which relief was denied in prior litigation." *Id.* In other words, the Fourth Circuit has recently held — contrary to the decision of the Court of Appeals in this case — that there is no *per se* rule that the continuation of the challenged conduct after the initial action bars claim preclusion.

The First Circuit, in *Walsh v. International Longshoremen's Association, AFL-CIO, Local 799, supra,* has also explicitly indicated its disagreement with the *per se* rule. Prior litigation had decided that the National Labor Relations Board did not have

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single transaction," (App. A., p.-5), *quoting General Electric*, 358 F. Supp. at 740 n.9, is unavailing. As indicated above, the plaintiff in *Engelhardt* alleged a continuing refusal to deal, and the Eighth Circuit decided the case on the continuing tort basis.

jurisdiction over a dispute concerning the ILA's refusal to handle Soviet cargo. In *Walsh*, the Board cited *Lawlor* and two lower court cases in support of the argument that each refusal to handle gave rise to a distinct cause of action. The Court of Appeals refused to accept this argument:

> In each of these cases, a previous judgment was held not to bar an action based on conduct of the same nature as that originally alleged. But in each case, the subsequent conduct was broader and more far-reaching than the conduct which led to the original complaint. Here, there is no broadening of the pattern of conduct. Rather, the conduct in each instance is the same; each ILA local simply follows the announced policy of the national union when it is asked to work on Soviet cargo. *To be sure, the particular application of union policy involved in this case had not occurred at the time of the Baldovin suit*, an l it had not therefore given rise to a cause of action which could have been sued on at that time. But the ILA's policy was announced on January 8, 1980, well before the instigation of the *Baldovin* suit. In *Baldovin*, tne Board sought to enjoin that policy and all conduct in furtherance of it. We think, therefore, that *it was that policy, and the resulting pattern of conduct, which gave rise to the cause of action in Baldovin, and again in this case*." *Id.* at 873. (emphasis added).

Although the case was ultimately decided on collateral estoppel grounds, this passage clearly reflects that the First Circuit found the Sixth Circuit's *per se* rule unpersuasive. And the First Circuit has since confirmed this conclusion. In *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1 (1st cir. 1983), that court cited *Walsh* for the proposition that *Lawlor* [is] "limited to cases where 'subsequent conduct was broader and more far-reaching than the conduct which led to the original complaint.' " *Id.* at 2.

To similar effect is a District Court case, *Neeld v. National Hockey League*, 439 F. Supp. 446 (W.D.N.Y. 1977). There, a one-eyed hockey player sued the NHL and its member

franchises, alleging antitrust violations because of his exclusion from the league. In holding the action barred by a prior one, the court explicitly followed *Engelhardt* and adopted the broad view of *Lawlor*.

> The instant complaint does not allege that defendants' conduct occurred solely after the entry of judgment in the California action but merely alleges that defendants have continued to deprive plaintiff of employment opportunities in the NHL subsequent to the commencement of the California action. Furthermore, there are no allegations which can be construed to assert new antitrust violations which did not exist at the time of judgment in the California action and no allegations are made that in the interim period there has been any substantial change in the scope or extent of defendants' adherence to Section 12.6. *See, Engelhardt v. Bell & Howell Co.*, 327 F.2d 30, 36 (8th Cir. 1964)."

Accord, Commonwealth of Pennsylvania v. Brown, supra; at 326, (applying claim preclusion to a subsequent suit seeking to end a ". . . continuing policy of restrictive admissions . . ." because "the original purpose of the earlier proceeding was to end the discrimination" and "[n]othing new has occurred . . ." that would make the policy any more violative than it was previously).

Other cases, while not necessarily presenting the issue so expressly, nevertheless make clear their belief that, as stated by Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* Section 4409 (1981), "[c]laim preclusion should apply . . . if the object of the first proceeding was to establish the legality of the continuing conduct into the future." For example, in *Carr v. United States*, 507 F.2d 191 (5th Cir. 1975) *cert. denied* 422 U.S. 1043 (1975), a retired serviceman claimed a right to a higher rate of disability pay than the government was awarding him. He lost one litigation, and several years later commenced another, raising constitutional arguments. The Fifth Circuit held the later action barred by *res judicata*, holding:

The acts complained of — the government's refusal to award a higher rate of retirement pay — are identical. No material facts have been alleged that were absent from the Court of Claims deliberations. In essence, the only difference is appellant's theory of recovery." *Id.* at 193.

Similarly, in *Roy v. City of Augusta, Maine,* 712 F.2d 1517 (1st Cir. 1983), the Plaintiff claimed to have rights of first refusal to a pool hall he had previously owned. He sued in state court, seeking to have the license granted another person declared void, but lost. He then brought a federal action under 42 U.S.C. Section 1983, seeking damages presumably up to the date of that action. The First Circuit held the claim barred:

> Under modern principles of res judicata, a party cannot split his claim by first seeking one type of remedy in one action and later asking for another type of remedy in a second action. *See Restatement (Second) of Judgments* Sections 24 and 25. *Id.* at 1521.

4. Uncertainty in the Circuits

Not only are the various circuits in conflict about the scope of claim preclusion in cases of continuing conduct, but they have expressed a good deal of uncertainty on this issue.

a. The Federal Circuit

In this regard, *The Young Engineers, Inc. v. International Trade Commission, supra,* is illustrative. There, the Federal Court described *Lawlor* as a case

> where a second antitrust suit was held to be not barred because the acts complained of in the second suit were all subsequent to the first, the acts were "new" violations of a different nature, and the defendant's monopoly had substantially increased. *Id.* at 1313

This summary suggests that the Federal Circuit found the broad view of *Lawlor,* the one adopted by cases such as *Engelhardt,* hospitable. And, although the Court rejected the applicability of

claim preclusion in the case before it, it did so under that broad view:

> Even under the broad view that a claim may embrace continuing conduct subsequent to the judgment, we find no authority that claim preclusion would apply to conduct of a different nature from that involved in the prior litigation. *Lawlor v. National Screen Service Corp., supra,* is clearly to the contrary. *Id.*, at 1316.

Thus, *The Young Engineers* might plausibly be read as adopting the broad view of Lawlor. At the very least, by applying that rule, the Federal Court indicated that it was not persuaded that the *per se* view of *Lawlor,* the one enunciated by the Court of Appeals in this case, is correct.

b. The Ninth Circuit

In two very recent cases, the Ninth Circuit has also manifested uncertainty over the scope of *Lawlor*. The first, *California v. Chevron Corp.*, 872 F.2d 1410 (9th Cir. 1989) *Petition for cert. filed,* __ U.S. __, involved appeals from two separate actions. The District Court had held that its dismissal of the earlier claims required dismissal on *res judicata* grounds of some of the later claims, which involved substantially the same allegations but involved a later period. The Ninth Circuit, by reversing the District Court judgments in the earlier action, undercut the basis for the District Court's judgment in the later action. But the Ninth Circuit made a special point of indicating its uncertainty about the applicability of *res judicata*:

> [*I*]*t is unclear* whether the prior federal judgment in this case actually would have operated as a *res judicata* bar to the state law claims being brought. A judgment covering an earlier time period *need not necessarily* operate as a *res judicata* bar to a lawsuit covering a later period even though both suits involve essentially the same course of wrongful conduct. *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S. Ct. 865, 99 L.Ed. 1122 (1955). Simply alleging the same type of claims against the same defendants for a

> later period *does not guarantee* a *res judicata* bar, because factual matters, such as the conduct of the parties since the first judgment, must be considered. *Id.* (emphasis added).

The Ninth Circuit seems rather clearly not to have read *Lawlor* as prescribing a *per se* rule against claim preclusion. The Court's concern to establish that a continuing course of conduct "need not necessarily operate as," and "does not guarantee" a *res judicata* bar, suggests that it did not contemplate that *res judicata* could *never* apply to a continuing cause of action. In any event, the Ninth Circuit made explicit, in the first sentence of this quoted passage, its uncertainty about the scope of claim preclusion in cases of this type.

That uncertainty was manifest again in *Harkins Amusement Enterprises v. Harry Nace Co.*, 890 F.2d 181 (9th Cir. 1989). The Ninth Circuit's opinion, which denied application of *res judicata*, is rather cryptic. But the Court did not rest simply on the fact that "the plaintiff alleges conduct that occurred in a different time period" from the prior litigation, *Id.* at 183; it also relied on its perception that "the plaintiff alleges facts which by the defendant's own concession are at least 10 percent different from the facts alleged in *Harkins I*, " *Id.*

c. The First Circuit

The First Circuit has also expressed the uncertainty that pervades this area. That Court avoided deciding *Pignons*, *supra*, on ground of claim preclusion, explaining that this

> . . . is a concept which we hesitate to apply in this case because of the ambiguities surrounding its applicability to situations of ongoing wrongful conduct. *Compare Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326-28, 75 S. Ct. 865, 867-68, 99 L.Ed.2d 1122 (1955) (*res judicata* does not bar suit based on acts occurring after previous suit for 'essentially the same course of wrongful conduct') *with Walsh v. International Longshoremen's Association*, 630 F.2d 864, 873 (1st Cir. 1980) (*Lawlor* is limited to cases where 'subsequent conduct was broader and more far reach-

ing than the conduct which led to the original complaint.'). *Id* at 2.

Those "ambiguities" are obviously troubling to the lower courts. This Court should resolve the ambiguities by clarifying the applicability of claim preclusion to cases of continuing conduct.

C. The Court of Appeals' *Per Se* Rule is Incompatible With Modern Conceptions of Claim Preclusion.

1. The Modern Approach To Claim Preclusion Depends On A Pragmatic Conception Of The Bounds Of A Claim.

One reason for the lower courts' uncertainty about the scope of claim preclusion in cases of continuing conduct is that *Lawlor*, this court's last word on the subject, was decided thirty-five years ago, in a bygone era. The prevailing guide at that time to *res judicata* law, cited pervasively by *Lawlor,* 349 U.S. at 326 n.6, 328 n.12,14, 329 n.16,18,19, 330 n.21, was the first Restatement of Judgments which had been adopted in 1942, before modern concepts of civil procedure — such as the merger of law and equity and liberal provisions of joinder — had fully evolved. As explained by the Reporters of the Restatement (Second) of Judgments, in their Introduction, at 6 (1982):

> Decisions in the modern law of *res judicata* have been, or at least should have been necessarily shaped by the statutory provisions of the system of civil procedure. This relationship was not always fully appreciated. In particular, the decisional law of *res judicata* took only belated account of major legislative changes in the law of civil procedures, notably the adoption of the Field Code in the middle of the 19th Century and the adoption of the Federal Rules in the middle of this century. Thus, despite introduction of the concept of the single form of action in the Field Code, the courts persisted in defining 'cause of action' for *res judicata* purposes in terms of the common law forms of action. A century later, when the Field Code was supplanted by the Federal Rules of Civil Procedure, the courts' adherence to anachronistic rules of *res*

judicata repeated itself, this time in the application of *res judicata* concepts based on Code pleading to judgments produced through Federal Rules procedure. This same difficulty left its mark on the first Restatement of Judgments. That Restatement, published less than four years after the Federal Rules had been adopted for the federal courts, was based on cases decided under the codes.

Since 1955, when *Lawlor* was decided, there has been a dramatic transformation in the law of *res judicata,* as exemplified by the Restatement (Second) of Judgments. The Second Restatement manifests a significantly broader and more flexible approach to claim preclusion. *See Id.*, comments, a,b to Section 24, at 196-98. Under that approach, preclusion generally applies to rights that arise out of the same "transaction, or series of connected transactions," Section 24(1), and what constitutes a "transaction" or a "series" is "to be determined pragmatically," depending on numerous factors, Section 24(2).

In *Nevada v. United States*, 463 U.S. 110, 130-31 n.12 (1983), this Court approvingly referred to the "more pragmatic approach" of the Second Restatement, and implies that its standards should now prevail. Nevertheless, it was unnecessary to decide the issue there, because the Court concluded that the result would be the same under either Restatement. *Id.* at 131 n.12 Several circuits, however, have adopted the transactional approach. *E.g., Kurzweg v. Marple*, 841 F.2d 635, 640 (5th Cir. 1988). *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329, 1335 (10th Cir.) (citing other opinions adopting approach). It is clearly "the present trend among courts nationwide." *Hagee v. City of Evanston*, 729 F.2d 510, 513 n.5 (7th Cir. 1984). And while other decisions look for a common nucleus of operative facts e.g. *Robbins v. District Court of Worth County*, 592 F.2d, 1015, 1017-1018 (8th Cir. 1979) *cert. denied,* 444 U.S. 852 (1979), as *Wright, Miller and Cooper* have observed, the impetus in most decisions is to displace the earlier formulas and work "... toward the transactional approach ... ". *Id.* at Jurisdiction Section 4407.

In this case the Court of Appeals made no reference in its discussion of the claim preclusion question to the Second Restatement or the transactional test. And of the few cases that the Court of Appeals cited, none either cited or applied the Second Restatement or the transactional test. This omission is particularly significant since it dramatizes the inherent problem created by the *per se* approach. In *James v. Gerber Product Company*, 587 F.2d 324, 328 n.5 (6th Cir.) the Lower Court recognized the modern approach of claim determination, observing, "In recent years the Courts have defined the term 'claim' for *res judicata* purposes in an expansive manner", and citing the Restatement (Second) of Judgments applied the transactional test to the facts before it stating: "We find that the 1966 and 1968 sales of Gerber stock were connected transactions which gave rise to a single claim". *Id.* Here, however, the *per se* rule pre-empts the modern analytical approach, fixating the concept of claim to a prior era. The establishment of the mechanical *per se* rule is therefore incompatible with the modern pragmatic approach to claim preclusion.

> ***2. Under the Modern Approach To Claim Preclusion, An Action Brought To Determine The Legality Of A Practice May, In An Appropriate Case, Preclude A Later Action Brought To Determine The Legality Of The Same Practice.***

Often, when successive actions challenge a similar course of conduct, some material facts will change from one action to the other. When that is so, the judgment in the first action ordinarily cannot preclude the second claim. Such differences between the two actions account for the results in *Lawlor*, as explained *supra* pp. 9-10, and in such cases as *The Young Engineers*, *supra* p. 14, and *Harkins*, *supra* p. 16, in which the Ninth Circuit emphasized that "the plaintiff alleges facts which . . . are at least 10 percent different from the facts alleged in [the prior action]," 890 F.2d at 183.

But this is not always true. Sometimes, the course of continuing conduct remains unchanged in all material respects from one

action to another. Such cases arise frequently. *Englehardt, supra* p. 10, *Walsh supra* p. 11, and *Peugeot, supra*, p. 11, are all examples. And, as further discussed below, the present case is particularly pristine in this respect.

The question, then, is whether the mere fact that the second action asks for damages for a different time period from the first makes what would otherwise be one claim into two, and thus bars application of claim preclusion. We believe that modern concepts of claim preclusion foreclose such a conclusion.

The Second Restatement's basic rule of claim preclusion, in Section 24, explicitly recognizes that a single claim may have continuity over time. Thus, preclusion applies not only to a "transaction", but also to a "series of connected transactions", Restatement (Second) of Judgments Section 24(1). The "series" terms is not mere surplusage, *see: Petromanagement Corp. v. Acme-Thomas Joint Venture, supra*, 1336 (10th Cir. 1988) (declining to decide that two actions arose out of the same transaction, but holding the second precluded on the ground that they did arise out of a same "series of transactions".) Furthermore, in determining "pragmatically" what "groupings" constitute a "transaction" or a "series", courts are to

> giv[e] weight to such considerations as *whether the facts are related in time*, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage. Restatement (Second) of Judgments Section 24(2) (emphasis added).

As an illustration, assume in this case that the first action was brought in 1985 rather than 1983, but that it only sought damages for the period prior to 1983. If the plaintiff later brought another action seeking damages for the period from 1983 to 1985, it would clearly be precluded, *e.g., Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 669 F.2d 490, 494 (7th Cir.), *cert. denied*, 459 U.S. 943 (1982). There could be no plausible contention that because

the 1983-85 damages were part of a different time period they formed a different claim and so were not precluded.

This demonstrates the inappositeness of language such as that quoted by the Court of Appeals, (App. A., p. A-5), from *Ohio-Sealy*, *supra*, 669 F.2d at 494, to the effect that "[i]n the context of a continuing scheme to violate the antitrust laws, a cause of action accrues to the plaintiff each time the defendant engages in antitrust conduct that harms the plaintiff". As demonstrated by Judge Goodrich's opinion in *Williamson v. Columbia Gas & Electric Corp.*, 186 F.2d 464, (3rd Cir. 1950), this statement is true in the context of determining the applicability of a statute of limitations to continuing conduct — even if a course of conduct began long before the statutory period, the plaintiff has a claim for conduct occurring within that period — but it has no relevance in determining the entirely separate question of claim preclusion. *Accord: Neeld v. National Hockey League, supra,* p. 12. It is significant in this respect that *Ohio-Sealy* relied in large part on *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), a statute of limitations case. It simply is not true that a plaintiff may divide a series of transactions into numerous time periods, and then sue separately on each one, on the ground that each time the defendant engaged in the challenged conduct it gave rise to a separate cause of action.

The question, then, is whether by bringing an action at a given time a plaintiff must necessarily be deemed to have validly split what would otherwise be one claim, so that the plaintiff may bring separate suits challenging the same course of conduct, even though no material facts have changed between the two periods. As shown above in Section B, numerous cases support the proposition enunciated in Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* Section 4409 (1981), that "[c]laim preclusion should apply . . . if the object of the first proceeding was to establish the legality of the continuing conduct into the future."

The applicability of this proposition does not depend on whether the case is an appropriate one for "permanent" damages.

On this point the Seventh Circuit case of *Gasbarra v. Park-Ohio Industries, Inc.*, 655 F.2d 119 (7th Cir. 1981), is instructive. There, the plaintiff had failed in an earlier action to establish his right to certain benefits. In the later action, he claimed those benefits for the period subsequent to the first action. He contended that — because under the controlling Illinois law these claims had not yet accrued at the time of the first action, and so could not be presented in that action — the claims could not be precluded by the first action. The Seventh Circuit responded succinctly:

> This theory confuses the issues of liability and damages . . . While the individual items of damages may not have yet accrued at the filing of the first suit, the question of the defendant's liability for the fringe benefits had clearly accrued and was ripe for decision . . . The question could have been resolved either by declaratory and injunctive relief or by a determination of liability which would have been res judicata in suits for future installments." *Id.* at 122.

In other words, under modern concepts of claim preclusion, the question of what claims could have been presented for damages in the first action need not be inextricably tied to the question of what claims are precluded by that action. Where the first action is brought to determine the legality of a continuing practice, the question of liability may be resolved, so that after-accruing claims based on continuation of the same practice without material change will be precluded. To the extent, if any, that *Lawlor's* language about "claims which did not even then exist", 349 U.S. at 328, *see supra* p. 9, is inconsistent with this proposition, *Gasbarra* indicates that it is imcompatible with modern principles of claim preclusion.

It bears emphasis that this is not an argument based on issue preclusion. That is, the premise of the argument is not that the first action establishes facts that must be taken as given in a second action. Rather, the premise is that judgment in the first action establishes the legal status of given facts, so that *if* the facts in the second action are materially the same, relitigation of that

legal status is precluded. If the facts in the second action are not materially the same, then obviously claim preclusion does not apply. *Cf. California v. Chevron Corp., supra* at 1415 (9th Cir. 1989) ("Simply alleging the same type of claims against the same defendants for a later period does not guarantee a *res judicata* bar, because factual matters, such as the conduct of parties since the first judgment, must be considered.").

D. The Court of Appeals' *Per Se* Rule Fails To Consider The Fact That The Prior Judgment Was Entered By Consent, And So Impedes Settlement Of Claims Concerning Continuing Conduct.

1. The Per Se Rule Frustrates Another Mechanism For Claim Determination.

The Court of Appeals in adopting a mechanical test for claim preclusion failed to take into account that the original action had been dismissed "with prejudice" by stipulation of the parties. The failure to address this factor ignores the fundamental principle that when a case is dismissed by consent of the parties the preclusive effect of the dismissal should be measured by the intent of the parties. Wright, Miller and Cooper, *supra* Jurisdiction Section 4443, p. 384.

Further, in stipulated matters, preclusion may extend to claims not formally presented. For instance, *In The Matter of Engineering Co-Op, Inc.*, 814 F.2d 1226, 1234 (7th Cir. 1987), the Court recognized that a party seeking to assert a claim in a second litigation has the burden of clarifying the scope of the dismissal with prejudice in the first action. Similarly, a stipulation can expressly give defendant "... fair warning of a later suit". *Torres v Rebarchak*, 814 F.2d 1219 (7th Cir. 1987). The *per se* rule invoked by the Lower Court dispenses with this process of claim determination. By its reliance on *Lawlor* which did not address its stipulation of dismissal, and its adherence to a *per se* rule, the Lower Court foreclosed itself from this vital inquiry.

2. *By Rejecting A Per Se Rule Attendant Policy Considerations of Are Facilitated.*

This Court has unequivocally expressed, ". . . a clear policy favoring settlements, *Marek v. Chesney*, 473 U.S. 1, 10 (1984), *Evans v. Jeff D.*, 475 U.S. 717, 732-733 (1985). By rejecting the *per se* rule, this policy would be fostered, along with the allied policy underlying the principle of *res judicata* which is ". . . to protect a defendant from the harassment of multiple actions". *Calderon Rosado v. General Electric Circuit Breakers*, 805 F.2d 1085 (1st Cir. 1986). Finally, by retaining this analysis rather than pre-empting it, the burden of preserving the claim would continue to be placed on the plaintiff since the plaintiff is exclusively in a position to circumscribe the scope of the stipulation. A defendant, on the other hand, must acquiesce in the stipulation of a plaintiff to dismiss with prejudice since ". . . no matter when the dismissal with prejudice is granted, it does not harm the defendant: the defendant receives all that he would receive had the case been completed". *Schwartz v. Folloder*, 767 F.2d 125, 129 (5th Cir. 1985), *see also: Smoot v. Fox*, 340 F.2d 301, 303 (6th Cir. 1964).

E. This Case Is An Appropriate One In Which To Establish That The Court Of Appeals' *Per Se* Rule Is In Error.

We have demonstrated that there is considerable conflict and uncertainty among the circuits as to whether the *per se* rule applied by the Court of Appeals is correct, and that this rule conflicts with the better understanding of *Lawlor* and with modern principles of *res judicata*. It is therefore important that this Court resolve the issue. The following demonstrates that this case is an appropriate one in which to do so.

1. *Except For The Time Element, The Actions Are Identical.*

Respondent brought the 1983 action to challenge the legality of a particular business arrangement — the co-promotion arrangement made by Olympia and Brass Ring in 1983. The current

action challenges the legality of the same arrangement. Thus, the case is similar to others such as ***Engelhardt, supra*** p. 10, ***Peugeot, supra*** p. 11, and ***Walsh, supra*** p. 11 — cases in which three different Courts of Appeals have provided strong support for the Wright, Miller & Cooper proposition that "[c]laim preclusion should apply . . . if the object of the first proceeding was to establish the legality of the continuing conduct into the future", *supra* p. 13.

Respondent does not allege in the 1987 Complaint that the petitioners' conduct or the underlying circumstances are different in any material respect from those alleged in the 1983 action. Indeed, Respondent has acknowledged that the *only* material difference between the 1983 and 1987 actions is that they ask for damages for different time periods. See: footnote 1. p. 7 *supra*. And this difference in time period is the *only* basis on which the Court of Appeals held claim preclusion improper.

The case is therefore pristine: Unlike cases such as *Lawlor* and *The Young Engineers, supra* p. 14, it presents no allegations of new types of unlawful conduct that would render claim preclusion inappropriate. Nor are there any allegations that any other material facts — such as the market environment — altered between the two actions in a way that would give Respondent in 1987 a valid claim that it did not have in 1983.

2. The 1983 Action Sought A Remedy Extending Into The Future.

The 1983 action, like this one, demanded injunctive relief against continuation of the challenged business arrangement. Thus, not only is the 1987 action based on the identical conduct under the same arrangement as was the 1983 action, but to a large extent the two actions ask for the very same relief.

This demand for injunctive relief in the 1983 action was based on the allegation that the petitioners' conduct was a continuous course of action likely to continue if not restrained. (App. K, p. K-7–K-8). Thus, there can be no real doubt — that the conduct that is the subject of the two actions is part of the

same "transaction" or "series of transactions". The damand for injunctive relief in the 1983 Complaint emphasizes that the earlier action placed squarely in contention the future validity of the exclusive arrangement. The Respondent ought not be allowed to relitigate that legal question.

3. The Prior Action Was Dismissed With Prejudice.

Had the judgment in the 1983 action been in Respondent's favor, the legal question would have been resolved, as pointed out by *Gasbarra, supra*, p. 22, 655 F.2d at 122, either by injunctive relief or by a determination of liability that the Respondent could have used collaterally in case of future violations; obviously, the Respondent's right of action for such future violations would have been preserved, and Petitioners would not have gained a future immunity, *see, e.g., Ohio-Sealy, supra* p. 20 (plaintiff that had won damages held not precluded from filing a new action seeking damages for post-verdict violations).

In fact, the judgment in the 1983 action was in Petitioners' favor; that judgment should be deemed to have resolved the question of whether they can pursue the same conduct that was the subject of the earlier action. This case is thus an ideal one for establishing that in appropriate circumstances a judgment might preclude an action seeking damages for identical conduct continuing after the first action.

4. The Prior Action Was Dismissed By Consent.

Because the dismissal of the 1983 action was by consent, this case provides a proper vehicle for the Court to examine and give direction in the area of construing the claim preclusive effect of stipulated dismissals with prejudice.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RICK KAY, ROBERT FOX, ROBERT CAVALIERI, MICHAEL ILITCH, PROPHET PRODUCTIONS, LTD., MICHAEL TINIK, OLYMPIA ARENAS, INC.,
Petitioners,

v.

CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN,
Respondent.

APPENDIX

T. PATRICK FREYDL*
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APPENDIX A

No. 90-1005

United States Court of Appeals

FOR THE SIXTH CIRCUIT

CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN,
Plaintiff-Appellant,

v.

RICK KAY, ROBERT FOX, ROBERT CAVALIERI, CHARLES FORBES, MICHAEL ILLITCH, OLYMPIA STADIUM CORP., PROPHET PRODUCTIONS, LTD., MICHAEL TINIK, VINCENT BANNON, THE BUILDING GROUP, OLYMPIA ARENAS, INC.,
Defendants-Appellees,
CITY OF DETROIT,
Defendant.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed March 8, 1990

Before: KENNEDY and NELSON, Circuit Judges; and WISEMAN, Chief District Judge.*

KENNEDY, Circuit Judge. Appellant Cellar Door Productions, Inc. appeals the grant of summary judgment on *res judicata* grounds in favor of appellees Rick Kay, Robert Fox, Prophet Productions, Ltd., and Michael Tinik (Brass Ring), and Robert Cavalieri, Michael Illitch, and Olympia Arenas, Inc. (Olympia) in this antitrust action. Appellant also appeals the District Court's order granting sanctions pursuant to Fed. R. Civ. P. 11 in favor of Brass Ring and Olympia.

We find reversible error in the District Court's order granting summary judgment for appellees. We also reverse the District Court's orders granting sanctions against appellant with respect to the taking of out-of-state depositions while appellees' dispositive *res judicata* motion was pending, and affirm with respect to the motion for reassignment.

Cellar Door and Brass Ring are competitors in the concert promotion industry. Olympia, through its lease with the City of Detroit, operates the Joe Louis Arena and the Cobo Arena in downtown Detroit. Olympia and Brass Ring have entered into an arrangement for the promotion of musical events at the arenas. During the time period in question, they were the only arenas in Detroit and their rental was alleged to be a relevant market. Cellar Door alleges that because Olympia does not offer the arenas to it on the same rental terms as it offers them to Brass Ring, Brass Ring is able to offer performers more financially attractive terms than is Cellar Door. Therefore, Cellar Door alleges, the arrangement between Olympia and Brass Ring has effectively precluded Cellar Door from competing with Brass Ring in the Detroit market.

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* The Honorable Thomas A. Wiseman, Jr., Chief Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

In 1983, Cellar Door instituted an antitrust action against Olympia and Brass Ring based on the same arrangement. That action was dismissed with prejudice by stipulation of the parties. In the present action, Cellar Door complains of antitrust violations that occurred subsequent to the dismissal of the 1983 action.

We first consider appellant's contention that the District Court erred in granting appellees' motion for summary judgment on *res judicata* grounds. The Supreme Court case of *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), is controlling. In *Lawlor*, the plaintiffs brought an antitrust action in 1942 alleging that the defendants, National Screen and three producers, had conspired to establish a monopoly in the distribution of advertising posters to motion picture exhibitors through the use of exclusive licenses, and that the plaintiffs' business had been injured as a result. In 1943, prior to trial, that suit was settled and dismissed with prejudice. *Id.* at 324. The settlement was based upon an agreement by National Screen to furnish plaintiffs with all standard accessories distributed by National Screen pursuant to its exclusive license agreements. In 1949, the plaintiffs brought another antitrust action, this time alleging that the prior settlement was merely a device used by the defendants to perpetuate their conspiracy and monopoly. Plaintiffs also alleged that five other producers had joined the conspiracy since the 1943 dismissal, that defendant National Screen had deliberately made slow and erratic deliveries of advertising materials in an effort to destroy plaintiffs' business, and that defendant had used tie-in sales and other means of exploiting its monopoly power. *Id.* at 325. The Supreme Court held that the latter suit was not barred by *res judicata* because the two suits were not based on the same cause of action. *Id.* at 327. The Court noted:

> That both suits involved "essentially the same course of wrongful conduct" is not decisive. Such a course of conduct—for example, an abatable nuisance—may frequently give rise to more than a single cause of action . . . . While the 1943 judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims

> which did not even then exist and which could not possibly have been sued upon in the previous case.

Id. at 327-28 (footnote omitted).

Appellees argue that the differences between the 1942 complaint in *Lawlor* and the latter *Lawlor* complaint as well as differences in the circumstances surrounding the two complaints render the *Lawlor* decision inapplicable to the case at hand. Olympia and Brass Ring are correct that circumstances had changed during the period of time between the two suits in *Lawlor*. Because the defendant National Screen had entered into agreements with five additional motion picture producing companies, the complaint filed in the 1949 action included these companies as additional defendants. The latter complaint also alleged that there had been deliberate slowdowns on the delivery of materials under the license agreement entered into in settlement of the original action. The latter complaint further alleged that defendant National Screen had implemented an unlawful tie-in arrangement. Olympia and Brass Ring are incorrect, however, in their conclusion that these differences render *Lawlor* inapplicable to their case. The Court merely noted that *"[i]n addition,* there are new antitrust violations alleged here," and that "[i]n the interim, *moreover,* there was a substantial change in the scope of the defendants' alleged monopoly." *Lawlor*, 349 U.S. at 328 (emphasis added). The language of *Lawlor* indicates that the decision is predicated on the finding that both suits were not based upon the same cause of action.

Other courts have similarly interpreted *Lawlor,* although in cases not involving a prior voluntary dismissal with prejudice. The Southern District of New York, for example, in *United States v. General Electric Co.,* 358 F. Supp. 731, 740 (S.D.N.Y. 1973), stated:

> G.E. seeks to distinguish *Lawlor* upon the ground that in the second suit there were also additional allegations as to some new acts which it was claimed the defendants had committed since the earlier judgment. But, in my view, this was merely

an additional reason why res judicata did not apply. It did not limit the Court's holding that a suit based upon a course of wrongful conduct occurring subsequent to the judgment in the prior suit is not based on the same but on a different cause of action.

The Seventh Circuit has also followed *Lawlor* insofar as it held that "[i]n the context of a continuing scheme to violate the antitrust laws, a cause of action accrues to the plaintiff each time the defendant engages in antitrust conduct that harms the plaintiff." *See Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 669 F.2d 490, 494(7th Cir.), *cert. denied*, 459 U.S. 943 (1982).[1]

The facts of the case before us are similar to those of *Cream Top Creamery v. Dean Milk Co.*, 383 F.2d 358 (6th Cir. 1967). *Cream Top* involved an action alleging a continuing scheme to violate antitrust laws subsequent to a prior dismissal with prejudice. In that case, we relied upon *Lawlor* in reversing the District Court's order granting summary judgment on *res judicata* grounds. We noted, "[a]t least insofar as the complaint alleges violations since the dismissal of the [first] case, the judgment in that case cannot be given the effect of extinguishing a claim which arose subsequent to that judgment." *Id.* at 363 (citing *Lawlor*, 349 U.S. 322). Although *Cream Top* was based upon an alternative holding as well,[2] we concluded that with respect to the price discrimination allegations, "[t]he wrongful conduct charged in this case is composed of a multitude of separate transactions alleged to have been discriminatory. Each such transaction or

---

[1] In *Engelhardt v. Bell & Howell Co.*, 327 F.2d 30 (8th Cir. 1964), the Eighth Circuit found the new defendants and new antitrust violations necessary to the *Lawlor* holding. In that case, however, "both suits were based on a single breach of contract, only one refusal to deal and only a single transaction." *General Electric*, 358 F. Supp. at 740 n.9. We are unable to agree with the Eighth Circuit's interpretation of *Lawlor*.

[2] Because the prior case was a state court action, it did not involve a claim under the federal antitrust statutes. We concluded, therefore, that the District Court's dismissal with prejudice could not have adjudicated the alleged violations of those statutes. Thus the latter action alleging federal antitrust violations could not be barred by *res judicata*.

group of transactions, is proved to have the effects proscribed by the Robinson-Patman Act, might be held to be a separate legal wrong." *Id.* at 364.

In the case before us, Olympia and Brass Ring's course of conduct could give rise to more than one cause of action. Each time the arrangement precluded Cellar Door from competitively bidding for an event, a cause of action may have accrued to Cellar Door. Therefore, as in *Lawlor* and *Cream Top*, those causes of action that arose subsequent to the 1983 dismissal are not barred by *res judicata*. Accordingly, we must reverse the District Court's order granting summary judgment in favor of appellees.

Appellant also challenges the District Court's award of Rule 11 sanctions to appellees Olympia and Brass Ring. The court found that appellant had violated Rule 11 by (1) taking out-of-state depositions during the pendency of appellees' summary judgment motion and (2) violating local Rule 8c.1 as well as the corresponding directive on the Eastern District of Michigan civil cover sheet. Appellees failed to answer in the affirmative either of the following questions posed on the civil cover sheet:

PURSUANT TO LOCAL COURT RULE 8(c)(3)(i)

(a) IS THIS A CASE THAT HAS BEEN PREVIOUSLY DISCONTINUED OR DISMISSED WITHOUT PREJUDICE OR REMANDED TO A STATE COURT?

___ YES ___ NO

(b) IF YES GIVE THE FOLLOWING INFORMATION:

COURT: ___ CASE NO: ___

ASSIGNED JUDGE: ___

PURSUANT TO LOCAL COURT RULE 8(c)(3)(ii)

(a) OTHER THAN STATED ABOVE, ARE THERE ANY PENDING OR PREVIOUSLY DISCONTINUED OR DISMISSED COMPANION CASES **(cases in which it appears substantially similar evidence will be offered at trial or the same or related parties are present and the cases arise out of the same transaction or occurrence)** IN THIS OR ANY OTHER COURT, INCLUDING STATE COURT?

____YES ____NO

(b) IF *YES* GIVE THE FOLLOWING INFORMATION:

COURT: ____ CASE NO: ____

ASSIGNED JUDGE: ____

The court awarded appellees their costs incurred in connection with their motion for reassignment to the judge in the earlier action. Appellant argues that the District Court erred in granting sanctions on both of these grounds.

In light of our reversal of the District Court's grant of summary judgment for the appellees, we find that the taking of depositions during the pendency of the dispositive motion was not unreasonable behavior in violation of Fed. R. Civ. P. 11. Moreover, we seriously question whether Rule 11 sanctions may be imposed where, as here, a magistrate has denied a motion to quash the depositions and no appeal to the District Judge is taken from that order.

In agreeing with appellees that they were entitled to the sanctions attendant to appellees' motion for reassignment, the District Court stated:

> [T]he Court will award the fees and costs attendant upon the defendants being required to transfer this case . . . to this Court's docket. The failure to note a prior related case, a

companion case on the filing papers, in violation of the rules of this Court and the clear directives of the form, was done without reasonable inquiry as to the facts or the law or rules applicable

As examination of the discussion of this issue during the hearing on appellees' motions for attorney fees and costs reveals that the claim of appellees was that this case was in essence the *same* case as the 1983 case.[3] Indeed in granting summary judgment on *res judicata* grounds, the court found it was the same case and thus fell within the second requirement on the form. However, as we have discussed above, neither case arose out of the lease. Rather, the 1983 case arose out of events occuring after the lease went into effect and before the earlier case was dismissed, and the present case arose out of events occurring after its dismissal. Thus, the cases did not arise out of the same transaction or occurrence. To find otherwise would negate our finding that the District Court erred in finding the present case to be barred by *res judicata*. However, this case falls under the second inquiry, for the evidence presented during the two cases is likely to be substantially similar.

---

[3] Relevant portions of the record include the following statements by appellees' attorneys:

> [T]here is no question that the plaintiff was well aware that they had previously filed the suit.
>
> It was quite possible we could have gotten into this case sometime before finding out there was a previous suit. The local rule is there to make sure that neither the court nor the other parties are fooled by thinking that they're dealing with something brand new . . . .
>
> [T]he plaintiff made a misstatement on the cover sheet of the complaint saying that no other case had ever been filed, and of course it had been, the 1983 case was almost exactly what this case was, and that necessitated a motion being filed. The complaint itself was the same exact complaint as 1983.
>
> First of all, there's no question but that when this case was prepared by the plaintiff, Your Honor, that they were aware that they had filed a claim that was the identical claim that was filed in 1983.

It is possible to read the cover sheet inquiry as requiring that the case also "arise out of the same transaction or occurrence." A reading of the rule itself clarifies this issue. Local Rule 8c.1 provides:

> c. Assignment of Identical or Similar Cases.
>
> (1.) Companion cases will normally be heard by the Judge having the case with the lowest filing number. Companion cases are those cases in which it appears that:
>
> (i) Substantially similar evidence will be offered at trial, or
>
> (ii) The same or related parties are present, and the cases arise out of the same transaction or occurrence.
>
> Cases may be companion cases even though one of them may have already terminated.

Fed. Local Ct. Rules. E.D. Mich. Rule 8(c)(1) (1984).

If counsel had quesitons as to the meaning of the form, it was his obligation to read the rule.

Accordingly, we REVERSE the District Court's grant of summary judgment to appellees and the sanctions attendant to the taking of depositions, and AFFIRM the grant of sanctions attendant to appellees' motion for reassignment.

APPENDIX B

No. 90-1005

United States Court of Appeals

FOR THE SIXTH CIRCUIT

CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN, *Plaintiff-Appellant* vs. RICK KAY, ET AL., *Defendants-Appellees* THE CITY OF DETROIT, *Defendant*	**ORDER** Filed: April 6, 1990

Upon consideration of the motion of the appellees to stay issuance of the mandate pending application for writ of certiorari,

It is ORDERED that the motion be and hereby is granted for a period not to exceed thirty (30) days of the date herein.

ENTERED BY ORDER OF
THE COURT
Leonard Green, Clerk

/s/ LEONARD GREEN,
Clerk

APPENDIX C

No. 90-1005

United States Court of Appeals

FOR THE SIXTH CIRCUIT

<table>
<tr><td>CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN,
Plaintiff-Appellant,
v.
RICK KAY, ET AL.,
Defendants-Appellees,
CITY OF DETROIT,
Defendant.</td><td>FILED: MARCH 8, 1990</td></tr>
</table>

Before: KENNEDY and NELSON, Circuit Judges; and WISEMAN, Chief District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the said district court's grant of summary judgment to appellees and the sanctions attendant to the taking of depositions be reversed. IT IS FURTHER ORDERED that the grant of sanctions attendant to appellees' motion for reassignment by the said district court be affirmed.

Each party is bear its own costs on appeal.

ENTERED BY ORDER OF
THE COURT
Leonard Green, Clerk

/s/ LEONARD GREEN,
Clerk

A True Copy.

Attest:

/s/ TOM BENNIGNUS
Deputy Clerk

Issued as Mandate: May 10, 1990

COSTS: NONE

Filing fee . . . . $
Printing . . . . $
Total . . . . $

APPENDIX D

United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC., OF MICHIGAN, *Plaintiff,* v. RICK KAY, ET AL., *Defendants.*	CIVIL ACTION NO. 87 CV 70397 DT

DEFENDANT PROPHET PRODUCTIONS' MOTION FOR SUMMARY JUDGMENT

PROCEEDINGS HAD in the above-entitled matter before the Honorable ANNA DIGGS TAYLOR, United States District Judge of the Eastern District of Michigan, Southern Division, at 737 U.S. Courthouse and Federal Building, 231 Lafayette Boulevard West, Detroit, Michigan, on Monday, September 21, 1987.

APPEARANCES:

STEVEN KRAMER, ESQ.,
On behalf of Plaintiff.

T. PATRICK FREYDL, ESQ.,
On behalf of Defendants Kay, Fox, Forbes, Prophet Productions, Tinik, Bannon, and The Building Group.

ALAN C. HARNISCH, ESQ.,
On behalf of Defendants Cavalieri, Illitch and Olympia.

CHARLES A. MOORE, ESQ.,
On behalf of Defendant City of Detroit.

THE COURT: The Court is going to grant the defendant's motion for summary judgment because the Court does find that the doctrine of *res judicata* is applicable to this case. That doctrine is applicable when the first of the 2 actions filed was decided on the merits and when the matters contested in the second action were decided in the first; or, put another way, when the matters in the 2 actions arise out of a common nucleus of facts or out of the same transaction, and when the 2 actions were between the same parties and their privies.

This Court entered an order of dismissal with prejudice in November of 1983 in the previous lawsuit concerning the questions before it now. The Court is advised at this time that the stipulation on which the order of dismissal was based had been entered as a result of a settlement agreement between the parties. Apparently, they are depriving some access to the plaintiff to Joe Louis Arena and Cobo Hall.

The matters contested in the 1987 case are identical to those which were adjudicated by this Court in the 1983 action. The 2 actions are identical in that the plaintiff, a theatrical employment agency, or booking agency, alleges that an exclusive lease agreement between the defendant Prophet Productions, Olympia Stadium and Olympia Arenas has denied plaintiff access to Cobo Hall and Joe Louis Arena which the plaintiff alleges are essential facilities in this relevant market area. The plaintiff is claimed to have been charged discriminatorily high rental rates pursuant to this unlawful course of action.

In both complaints, the relevant geographic market is the tricounty Detroit metropolitan area, and Joe Louis and Cobo are alleged to be essential facilities within that market.

Both cases allege that the lease agreement which the defendants entered some years ago, in 1978, violates the Sherman Act, Sections 1 and 2, and in both lawsuits damages have been requested, and injunctive relief.

Defendant Prophet Productions was a named party in both actions too. The 1987 case has named individual defendants who

are the principals of the corporate defendants, and the 1987 case has added the City of Detroit as a defendant.

However, there is 1 common nucleus of facts in the entire set of litigation of 2 pieces of litigation, so the Court finds that inasmuch as it has entered its order of dismissal with prejudice of the case, there is no new cause of action that's alleged to have arisen subsequent thereto, and the Court must grant the defendant's dismissal on the basis of *res judicata*.

Please submit an order.

APPENDIX E

In The United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN, a Michigan corporation, *Plaintiff,* vs. RICK KAY, ROBERT FOX, ROBERT CAVALIERI, CHARLES FORBES, MICHAEL ILITCH, OLYMPIA STADIUM CORPORATION, a Michigan corporation; OLYMPIA ARENAS, INC., a Michigan corporation; PROPHET PRODUCTIONS LTD., a Michigan corporation, MICHAEL TINIK, VINCENT BANNON, and THE BUILDING GROUP, CITY OF DETROIT, *Defendants.*	CASE NO. 87CV70397 DT HON. ANNA DIGGS TAYLOR

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ALAN C. HARNISCH (P14654)
ALAN M. GERSHEL (P29652)
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(313) 353-7620

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT OF DEFENDANT PROPHET PRODUCTIONS, LTD.

At a session of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 16th day of October, 1987

PRESENT: THE HONORABLE ANNA DIGGS TAYLOR
U.S. District Court Judge

This matter having been brought on by Motion of Defendant, Prophet Productions, Ltd., and the respective parties thereto having filed pleadings, and the Court having heard the arguments of counsel in open Court and the Court being otherwise advised in the premises;

For the reasons set forth on the record by the Court at the hearing conducted on September 21, 1987, the Motion of Summary Judgment of Defendant, Prophet Productions, Ltd. is hereby GRANTED.

/s/ ANNA DIGGS TAYLOR
U.S. District Court Judge

APPROVED AS TO FORM:

/s/ STEVEN M. KRAMER
STEVEN M. KRAMER
Attorney for Plaintiff

/s/ STEVEN J. WEISS
STEVEN J. WEISS
Of Counsel for Plaintiff

A TRUE COPY
By /s/ SHERRY STAMP
SHERRY STAMP
Deputy Clerk

APPENDIX F

United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC., OF MICHIGAN, *Plaintiff.* v. RICK KAY, ET AL., *Defendants.*	CIVIL ACTION NO. 87 CV 70397 DT

DEFENDANTS' KAY, FOX AND TINIK MOTION FOR SUMMARY JUDGMENT

PROCEEDINGS HAD in the above-entitled matter before the Honorable ANNA DIGGS TAYLOR, United States District Judge of the Eastern District of Michigan, Southern Division, at 737 U.S. Courthouse and Federal Building, 231 Lafayette Boulevard West, Detroit, Michigan, on Monday, October 19, 1987.

APPEARANCES:

STEVEN KRAMER, ESQ.,
STEVEN J. WEISS, ESQ.,
On behalf of Plaintiff.

T. PATRICK FREYDL, ESQ.,
On behalf of Defendants Kay, Fox, Forbes, Prophet Productions, Tinik, Bannon, and The Building Group.

ALAN C. HARNISCH, ESQ.,
On behalf of Defendants Cavalieri, Illitch and Olympia.

CHARLES A. MOORE, ESQ.,
On behalf of Defendant City of Detroit.

THE COURT: All right. Thank you.

The Court is going to grant the defendants' Fox, Tinik and Kay motion for summary judgment on the basis of the doctrine of *res judicata*. The first action between these parties or their privies was decided on the merits. A voluntary dismissal with prejudice was entered by this Court in November of 1983. The matters contested in the second action were decided by the first dismissal with prejudice, and are identical today. They concern an exclusive lease agreement between defendant Prophet Productions, d/b/a Brass Ring, Olympia Stadium and Olympia Arena, which was alleged to have denied plaintiff access to Cobo Hall and Joe Louis Arena, and in which the plaintiff claims to have been charged discriminatorily high rental rates.

In both cases the relevant geographic market is the tricounty-Detroit metropolitan area, and both cases allege that the lease agreement violates the Sherman Act, Sections 1 and 2, together with the implementation of the lease agreement.

The relief requested in both are injunctive relief and damages.

The 2 actions were also between the same parties or their privies. The 1983 action was against the corporate entities; the 1987 action is against the same corporate defendants as well as these individual principals of the corporate defendant.

So on the basis of the *res judicata* doctrine as applied in the Sixth Circuit, which gives full binding effect to the voluntary dismissal with prejudice the Court will grant the motion.

APPENDIX G

In The United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN, a Michigan corporation, *Plaintiff.* vs. RICK KAY, ROBERT FOX, ROBERT CAVALIERI, CHARLES FORBES, MICHAEL ILITCH, OLYMPIA STADIUM CORPORATION, a Michigan corporation; OLYMPIA ARENAS, INC., a Michigan corporation; PROPHET PRODUCTIONS LTD., a Michigan corporation, MICHAEL TINIK, VINCENT BANNON, and THE BUILDING GROUP, CITY OF DETROIT, *Defendants.*	CASE NO. 87CV70397 DT HON. ANNA DIGGS TAYLOR

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AND THE BUILDING GROUP
CO-COUNSEL FOR
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Attorney for Defendants
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2000 Town Center, Suite 1500
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(313) 353-7620

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS, RICK KAY, ROBERT FOX AND MICHAEL TINIK.

At a session of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the day of October, 1987

PRESENT: THE HONORABLE

U.S. District Court Judge

This matter having been brought on by Defendants, Rick Kay, Robert Fox and Michael Tinik, and the respective parties thereto having filed pleadings, and the Court having heard the arguments of counsel in open Court and the Court being otherwise advised in the premises;

For the reasons set forth upon the record of the Court at the hearing conducted on October 19, 1987, the Motion for Summary Judgment of Defendants Rick Kay, Robert Fox and Michael Tinik is hereby GRANTED.

/s/ ANNA DIGGS TAYLOR
U.S. District Court Judge

OCT 29 1987
A TRUE COPY
/s/ SARA BALLINGER
Clerk

APPENDIX H

United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC., OF MICHIGAN, *Plaintiff.* v RICK KAY, et al., *Defendants.*	CIVIL ACTION NO. 87 CV 70397 DT

DEFENDANTS' OLYMPIA, CAVALIERI AND ILLITCH MOTION FOR SUMMARY JUDGMENT

PROCEEDINGS HAD in the above-entitled matter before the Honorable ANNA DIGGS TAYLOR, United States District Judge of the Eastern District of Michigan, Southern Division, at 737 U.S. Courthouse and Federal Building, 231 Lafayette Boulevard West, Detroit, Michigan, on Monday, October 19, 1987.

APPEARANCES:

STEVEN KRAMER, ESQ.,
STEVE J. WEISS, ESQ.,
On behalf of Plaintiff.

T. PATRICK FREYDL, ESQ.,
On behalf of Defendants Kay, Fox, Forbes. Prophet Production, Tinik, Bannon, and The Building Group.

ALAN C. HARNISCH, ESQ.,
On behalf of Defendants Cavalieri, Illitch and Olympia.

CHARLES A. MOORE, ESQ.,
On behalf of Defendant City of Detroit.

THE COURT: The Court will grant the defendants' motion for summary judgment. It is undisputed that defendant Michael Illitch is a principal of the Olympia defendants, and defendant Cavalieri was the manager of the Olympia facilities Joe Louis Arena and Cobo Arena, and they are the added defendants in this 1987 lawsuit, and the only factor that distinguished the 1987 lawsuit from the 1983 case which the defendants and the plaintiffs together dismissed with prejudice in 1983.

The Court will grant the motion for dismissal for *res judicata* for the reasons that have been argued here, and for the reasons that the Court has stated on the past 2 motions.

APPENDIX I

In The United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN, a Michigan corporation, *Plaintiff,* vs. RICK KAY, ROBERT FOX, ROBERT CAVALIERI, CHARLES FORBES, MICHAEL ILITCH, OLYMPIA STADIUM CORPORATION, a Michigan corporation; OLYMPIA ARENAS, INC., a Michigan corporation; PROPHET PRODUCTIONS LTD., a Michigan corporation, MICHAEL TINIK, VINCENT BANNON, and THE BUILDING GROUP, CITY OF DETROIT, *Defendants.*	CASE NO. 87CV70397 DT HON. ANNA DIGGS TAYLOR

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VINCENT BANNON,
PROPHET PRODUCTIONS, LTD.
AND THE BUILDING GROUP
CO-COUNSEL FOR
DEFENDANTS
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ALAN M. GERSHEL (P29652)
Attorney for Defendants
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MICHAEL ILITCH AND
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2000 Town Center, Suite 1500
Southfield, MI 48075
(313) 353-7620

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS, OLYMPIA ARENAS, INC., A MICHIGAN CORPORATION, ROBERT CAVALIERI AND MICHAEL ILITCH

At a session of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the day of October, 1987

PRESENT: THE HONORABLE ANNA DIGGS TAYLOR
U.S. District Court Judge

This matter having been brought on by Defendants, Olympia Arenas, Inc., a Michigan corporation, Robert Cavalieri and Michael Ilitch and the respective parties thereto having filed

pleadings, and the Court having heard the arguments of counsel in open Court and the Court being otherwise advised in the premises;

For the reasons set forth upon the record of the Court at the hearing conducted on October 19, 1987, the Motion for Summary Judgment of Defendants, Olympia Arenas, Inc., a Michigan corporation, Robert Cavalieri and Michael Ilitch, is hereby GRANTED.

/s/ ANNA DIGGS TAYLOR
U.S. District Court Judge

OCT 29, 1987

A TRUE COPY

/s/ SARA BALLINGER
Clerk

APPENDIX J

United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN, a Michigan corporation, *Plaintiff,* vs. OLYMPIA STADIUM CORPORATION, a Michigan corporation; OLYMPIA ARENAS, INC., a Michigan corporation; and PROPHET PRODUCTIONS LTD., a Michigan corporation *Defendants.*	NO. 83-CV2560-DT HON. ANNA DIGGS TAYLOR

STIPULATION OF DISMISSAL

IT IS HEREBY STIPULATED AND AGREED by and between the parties, through their respective counsel, that the above captioned cause be dismissed with prejudice and without costs to either party.

DYKEMA, GOSSETT, SPENCER, GOODNOW & TRIGG

BY /s/ JEFF M. LIPSHAW
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JEFFREY M. LIPSHAW P-30713
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FRIMET, BELLAMY, GILCHRIST & LITES

BY /s/ JAMES R. LITES

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ORDER OF DISMISSAL

At a regular session of said Court held in the U.S. District Courthouse, Detroit, Michigan on 3 NOV 1983
PRESENT: HON. ANNA DIGGS TAYLOR
U.S. District Court Judge

The parties hereto having stipulated to dismissal of the above captioned matter, and the Court having been fully advised in the premises,

IT IS HEREBY ORDERED that the above captioned matter be and the same hereby is dismissed with prejudice and without costs to either party.

/s/ ANNA DIGGS TAYLOR
U.S. District Court Judge

APPENDIX K

United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN, a Michigan corporation, *Plaintiff,* vs. OLYMPIA STADIUM CORPORATION, a Michigan corporation; OLYMPIA ARENAS, INC., a Michigan corporation; and PROPHET PRODUCTION LTD., a Michigan corporation, *Defendants.*	CIVIL ACTION NO. 83CV2560 DT HON. ANNA DIGGS TAYLOR

Howard E. O'Leary (P18461)
Jeffrey M. Lipshaw (P30713)
Attorneys for Plaintiff

VERIFIED COMPLAINT

Plaintiff Cellar Door Productions, Inc. of Michigan, by its attorneys Dykema, Gossett, Spencer, Goodnow & Trigg, for its complaint against defendants states as follows:

1. Plaintiff Cellar Door Productions, Inc. of Michigan ("Cellar Door"), is a Michigan corporation with its principal place of business in the City of Southfield, Michigan. Plaintiff Cellar Door is licensed under the laws of the State of Michigan as a theatrical employment agency. Plaintiff Cellar Door is engaged in the business of promoting and producing arena attraction musical events for presentation at Cobo Arena, Joe Louis Arena

and elsewhere. An arena atrraction musical event is an event featuring an individual musical performer or musical group believed to be capable of selling approximately 7,500–20,000 seats for one performance and requiring a financial guarantee of from $15,000 to $100,000 for one performance.

2. Defendant Olympia Stadium Corporation ("Stadium") and defendant Olympia Arenas, Inc. ("Arenas") are Michigan corporations with their principal place of business in Detroit, Michigan. Defendant Stadium leases and operates two facilities in Detroit, Michigan known as Cobo Arena, located at 301 Civic Center Drive, Detroit, Michigan, and Joe Louis Arena, located at 600 Civic Center Drive, Detroit, Michigan, pursuant to a master lease agreement, dated August 16, 1978, with the City of Detroit. Upon information and belief, defendant Arenas is an affiliate of defendant Stadium, which leases Cobo Arena and Joe Louis Arena to Cellar Door and others for the promotion and production of musical events and other events.

3. Defendant Prophet Production Ltd. is a Michigan corporation doing business under the trade name Brass Ring Productions with its principal place of business in Birmingham, Michigan. For purposes of this complaint, the defendant Prophet Production Ltd. will be referred to under its trade name, Brass Ring Productions ("Brass Ring"). Brass Ring is licensed under the laws of the State of Michigan as a theatrical employment agency. Defendant Brass Ring is also engaged in the business of promoting and producing musical events for presentation at Cobo Arena, Joe Louis Arena and elsewhere.

Jurisdictional Allegations

4. This court has jurisdiction over the defendants by reason of the fact that each of them carries on a continuous and systematic part of their general business within the State of Michigan and are incorporated in the State of Michigan.

5. This court has jurisdiction of the action because the amount in controversy exceeds the sum or value of Ten Thousand

Dollars ($10,000.00), exclusive of interest and costs, and arises under the Sherman Act §§ 1 and 2, 15 U.S.C. §§ 1 and 2, Clayton Act §§ 4 and 16, 15 U.S.C. §§ 16 and 26, as to Counts I and II, which satisfies the jurisdictional requirements set forth in 28 U.S.C. §§ 1331 and 1337.

6. Venue in this court over this action lies pursuant to 15 U.S.C. § 26, 28 U.S.C. § 1391, 15 U.S.C. § 22.

Interstate Commerce

7. All of the parties in this action are engaged in commerce and engaged in activities affecting commerce among the several states within the meaning of §§ 1 and 2 of the Sherman Act.

Factual Allegations

8. Plaintiff Cellar Door and defendant Brass Ring are direct horizontal competitors in the promotion and production of arena attraction musical events in the Tri-County Detroit area of Wayne, Oakland and Macomb counties in the State of Michigan.

9. The Tri-County Detroit area is the relevant geographic market in this action.

10. The promotion and production of arena attraction musical events in the Tri-County Detroit area is the relevant line of commerce in this action.

11. There are a limited number of facilities in the Tri-County Detroit area that are suitable for the promotion and production of arena attraction musical events because of seating capacity, economic feasibility, acoustics and for other reasons.

12. Cobo Arena and Joe Louis Arena are essential facilities for the promotion and production of arena attraction musical events in the Tri-County Detroit area because of seating capacity, economic feasibility, acoustics and for other reasons. Cobo Arena and Joe Louis Arena are also the only year-round suitable facilities economically feasible for the promotion and production

of such events, to which Cellar Door has access in the Tri-County Detroit area.

13. As a result of defendant Stadium's August 16, 1978 master lease agreement with the City of Detroit, defendants Stadium and Arenas have the exclusive right to lease Cobo Arena and Joe Louis Arena for the promotion and production of such events.

14. Defendants Stadium and Arenas have entered into an exclusive agreement with defendant Brass Ring to promote and produce arena attraction musical events at Cobo Arena and Joe Louis Arena. The effect of this agreement is to deny Cellar Door access to Cobo Arena and Joe Louis Arena for the promotion and production of arena attraction musical events except on terms which are discriminatory and less favorable than the terms offered to Brass Ring for such facilities for such events. As a result, Brass Ring is able to offer performers and groups of performers more compensation for such events at Cobo Arena and Joe Louis Arena. As a result of such agreement, Brass Ring is also able to advertise such events for a longer period prior to the date tickets for such events are offered for sale. Upon information and belief, defendants Stadium and Arenas have also conspired among themselves and with defendant Brass Ring to refuse to deal with Cellar Door, except on discriminatory and unfavorable terms to Cellar Door.

15. In May 1983, Cellar Door requested that Stadium and Arenas grant Cellar Door access to Cobo Arena and Joe Louis Arena for the promotion and production of arena attraction musical events on the same terms as those granted to Brass Ring for such facilities for such events, and Cellar Door has not been granted access to such facilities on such equal terms.

16. As a result of the refusal by Stadium, Arenas and Brass Ring to grant access to Cobo Arena and Joe Louis Arena on equal terms for the promotion and production of arena attraction musical events, and as a result of the concerted refusal by Stadium, Arenas and Brass Ring to deal on such equal terms,

Cellar Door has suffered and continues to suffer injury in its business and property by being foreclosed from competing effectively with Stadium, Arenas and Brass Ring for the promotion and production of such events at Cobo Arena and Joe Louis Arena and elsewhere.

17. Cellar Door has suffered and continues to suffer injury in its business and property by being unable to offer individual musical performers and musical groups access to Cobo Arena and Joe Louis Arena on terms as favorable as those offered such performers by Stadium, Arenas and Brass Ring. Cellar Door has also suffered injury to its business and property because of the more favorable terms granted Brass Ring for the advertising of such events at Cobo Arena and Joe Louis Arena. As a result, Cellar Door has lost profits by being foreclosed from competing effectively for the promotion and production of arena attraction musical events at Cobo Arena and Joe Louis Arena and elsewhere featuring the following performers: (1) Styx, (2) Journey, (3) Stevie Nicks, and (4) Supertramp.

18. As a result of being foreclosed from competing effectively for the promotion and production of arena attraction musical events at Cobo Arena and Joe Louis Arena featuring the above performers, Cellar Door has also suffered injury in its business and property by virtue of the loss of goodwill and reputation among the above performers, and among other individual musical performers and musical groups and other persons.

19. The conduct of defendants Stadium, Arenas and Brass Ring, recently just begun, is continuing and will continue unless the injunctive relief as requested herein is granted.

20. Unless this court enjoins the defendants Stadium, Arenas and Brass Ring, their respective affiliates, their officers, agents, servants, employees, attorneys and those other persons in active concert or participation with them from collectively refusing to grant access to Cobo Arena and Joe Louis Arena on such equal terms and collectively refusing to deal on such terms, plaintiff Cellar Door will suffer the loss of goodwill and the loss of

reputation among performers and groups of performers and other persons, all to the immediate and irreparable injury of plaintiff. The extent of the injury is impossible to determine because the true value of Cellar Door's goodwill cannot be accurately quantified and plaintiff therefore has no adequate remedy at law.

COUNT I
(Violation of 15 U.S.C. § 1)

21. The allegations of ¶¶ 1-20 are incorporated herein by reference.

22. The exclusive arrangement among the defendants Stadium, Arenas and Brass Ring which denies Cellar Door access to the essential facilities of Cobo Arena and Joe Louis Arena for the promotion and production of arena attraction musical events except on discriminatory and unfavorable terms to Cellar Door, unreasonably forecloses competition in the relevant market and is illegal under Sherman Act, § 1, 15 U.S.C. § 1.

23. On information and belief, the conspiracy among defendants to refuse to deal with Cellar Door except on terms which are discriminatory and less favorable to Cellar Door is illegal per se under Sherman Act § 1, 15 U.S.C. § 1.

24. Plaintiff Cellar Door is threatened pursuant to Clayton Act, §§ 4, 16, 15 U.S.C. §§ 15, 26 with immediate and irreparable loss and damage to its business and property as a result of the unlawful conduct alleged and lacks an adequate remedy at law.

COUNT II
(Violation of 15 U.S.C. § 2)

25. The allegations of ¶¶ 1-20 are incorporated herein by reference.

26. The defendants Stadium and Arenas possess monopoly power in the market for facilities suitable for the promotion and production of arena attraction musical events in the Tri-County Detroit area because: (1) Cobo Arena and Joe Louis Arena are

essential facilities for the promotion and production of such musical events, and (2) the master lease agreement, dated August 16, 1978, between the defendant Stadium and the City of Detroit grants the defendants Stadium and Arenas the exclusive right to lease such facilities. By its agreement with the defendants Stadium and Arenas, Brass Ring is the beneficiary of Stadium and Arena's monopoly power.

27. The defendants have abused Stadium and Arena's monopoly power in the market for facilities suitable for the promotion and production of arena attraction musical events in the Tri-County Detroit area by foreclosing, restraining and excluding effective competition in a related market, namely; the market for the promotion and production of arena attraction musical events in the Tri-County Detroit area. The defendants have foreclosed, restrained and excluded effective competition in the market for the promotion and production of arena attraction musical events in the Tri-County Detroit area by refusing to grant access to Cobo Arena and Joe Louis Arena on equal terms for the promotion and production of such events, all in violation of Sherman Act, § 2, 15 U.S.C. § 2.

28. The defendants Stadium and Arenas have combined and conspired among themselves and with the defendant Brass Ring to monopolize and to attempt to monopolize the market for the promotion and production of arena attraction musical events in the Tri-County Detroit area by refusing to grant access to Cobo Arena and Joe Louis Arena on equal terms for the promotion and production of such events, all in violation of Sherman Act, § 2, 15 U.S.C. § 2.

WHEREFORE, Plaintiff prays:

(i) That the Court issue Preliminary and Permanent Injunctions enjoining Defendants, their affiliates, their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with them, from directly or indirectly:

(a) refusing to grant plaintiff access to Cobo Arena and Joe Louis Arena for the promotion and production of arena attraction musical events on equal terms;

(b) refusing to deal with plaintiff on terms similar to those received by defendant Brass Ring; and

(ii) that a judgment be entered against the defendants Stadium, Arenas and Brass Ring for an amount not precisely known at present but in excess of $10,000 with interest thereon for the damages suffered to date by plaintiff, together with the costs and disbursements of this action and the award of reasonable attorneys' fees; and

(iii) that the Court grant plaintiff such other and further relief as may be just.

Respectfully submitted,
DYKEMA, GOSSETT, SPENCER, GOODNOW & TRIGG

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And:

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June 28, 1983

APPENDIX L

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COMPLAINT

JURY TRIAL DEMANDED

PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS — SET I

In The United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN, a Michigan corporation, *Plaintiff,*	CIVIL ACTION
-v-	
RICK KAY, ROBERT FOX, ROBERT CAVALIERI, CHARLES FORBES, MICHAEL ILLITCH, OLYMPIA STADIUM CORPORATION, a Michigan corporation; OLYMPIA ARENAS, INC., a Michigan corporation; PROPHET PRODUCTIONS LTD., a Michigan corporation, MICHAEL TINIK, VINCENT BANNON, and THE BUILDING GROUP, CITY OF DETROIT, *Defendants.*	CASE NO. 87CV70397 DT HON. ANNA DIGGS TAYLOR JURY TRIAL DEMANDED

COMPLAINT

COUNT ONE
VIOLATION OF SHERMAN ACT, SECTION TWO
MONOPOLIZATION

Plaintiff Cellar Door Productions, Inc. of Michigan, by its attorneys Steven M. Kramer and Steve J. Weiss for its complaint against defendants states as follows:

I. JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted to secure treble damages and injunctive relief, as provided for in §§ 4 and 16 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731 (codified as 15 U.S.C. §§ 15 and 26) and commonly referred to as §§ 4 and 16 of the Clayton Act, from the above-named defendants for their violations of § 2 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (codified as 15 U.S.C. § 2), commonly known as the Sherman Act.

2. Jurisdiction as to these claims is vested in this Court by the Act of Congress of June 25, 1948, c. 646, §2, 62 Stat. 931 (codified as 28 U.S.C. §1337).

3. Each of the defendants herein is found or transacts business in this District, the unlawful activities hereinafter alleged were performed, in part, within this District; and the interstate trade and commerce hereinbelow described is carried on, in part, within this District.

II. THE PARTIES

4. Plaintiff Cellar Door Productions, Inc. of Michigan ("Cellar Door"), is a Michigan corporation with its principal place of business in the City of Southfield, Michigan. Plaintiff Cellar Door is engaged in the business of promoting and producing contemporary music concerts in the Detroit area.

5. Defendant Olympia Stadium Corporation ("Stadium") and defendant Olympia Arenas, Inc. ("Arenas") are Michigan corporations with their principal place of business in Detroit, Michigan. Defendant Stadium leases and operates two facilities in Detroit, Michigan known as Cobo Arena, located at 301 Civic Center Drive, Detroit, Michigan, and Joe Louis Arena, located at 600 Civic Center Drive, Detroit, Michigan, pursuant to a master lease agreement, dated August 16, 1978, with the City of Detroit. Upon information and belief, defendant Arenas is an affiliate of defendant Stadium, which leases Cobo arena and Joe Louis

Arena for the promotion and production of musical events and other events.

6. Defendant Prophet Productions Ltd. is a Michigan corporation doing business under the trade name Brass Ring Productions with its principal place of business in Birmingham, Michigan. For the purposes of this complaint, the defendant Prophet Productions Ltd. will be referred to under its trade name, Brass Ring Productions ("Brass Ring"). Defendant Brass Ring is engaged in the business of promoting contemporary concerts in the Detroit area.

7. Defendants Rick Kay, Robert Fox and Michael Tinik are principals of Brass Ring Productions. On behalf of themselves and Brass Ring, they engaged in some of the acts complained of herein.

8. Defendant Michael Illitch is a principal of the Olympia defendants and engaged in acts herein complained of.

9. Defendant Cavalieri, during all times relevant hereto was the manager of the Olympia facilities, Joe Louis Arena and Cobo Arena and engaged in acts herein complained of.

10. Defendant Forbes is the owner of the State, Fox and Gem Theatres and engaged in acts herein complained of.

11. Defendant City of Detroit entered into exclusive leases with the Olympia defendants for the operation of Cobo Arena and Joe Louis Arena.

12. Defendant Bannon is a principal in an affiliate of defendant Brass Ring and engaged in acts herein complained of. In addition, Bannon has an exclusive with a facility known as St. Andrews, for upon information and belief, the benefit of Brass Ring.

12A. The Building Group is, upon information and belief, a joint venture of defendants Olympia Arenas and Brass Ring and engaged in acts herein complained of.

III. INTERSTATE COMMERCE

13. The presentation of concerts by the parties and others occurs in interstate commerce.

(a) Virtually all of the artists who perform at said events cross state lines to do so, generating gross revenue for U.S. promoters in excess of $50,000,000.00 per annum.

(b) Many of the contractual relationships between promoters and artists for the performance of concerts in the Detroit Metropolitan Area are entered into in New York City and Los Angeles.

(c) Much of the sound and lighting equipment used in the presentation of the concerts are purchased from out of state.

(d) Many of the acts are performed by the defendants in interstate commerce.

IV. DEFINITIONS

14. Promoter — As used herein, the term "promoter" is defined as a person who presents live musical entertainment events (hereinafter referred to "concerts"). Concerts are performed by artists. In order to promote a concert, a promoter conducts, *inter alia*, the following activities:

(a) purchases the services of an artist;

(b) contracts with an artist, his manager, or his agent to obtain that artist's services for a particular location, facility, date and time;

(c) contracts with the owner of a facility in which the concert is to take place;

(d) sells tickets to the public, either directly or through ticket outlets;

(e) advertises the concert;

(f) performs various other activities, all of which are designed to successfully present the concert event to the public.

15. Artist — An artist is a musical recording artist. In the relevant product markets and sub-markets described herein, an artist usually has a recording contract with a record company. Typically, artists are usually categorized as follows:

(a) rock artist;

(b) M-O-R (middle of the road) artist;

(c) R & B Artist

(d) country and western artist

IV. THE RELEVANT PRODUCT MARKET AND THE RELEVANT GEOGRAPHIC MARKET

16. The relevant product market consists of the promotion of contemporary concerts. Within that market are, *inter alia*, the following relevant sub-markets:

(a) Promotion of concerts at the arena level;

(b) Promotion of concerts at the middle level;

(c) Promotion of concerts at the "club" level.

Within that market there are also the following sub-markets:

(a) rock concerts

(b) R&B concerts

(c) country and western concerts

(d) M-O-R concerts

17. The relevant geographic market is the Detroit Metropolitan Area.

V. MONOPOLY POWER

18. Defendants Olympia, and defendant City have monopoly power in the rental of arena level concert facilities as a result of an agreement entered into between the City and the Olympia defendants which grants the Olympia defendants the exclusive right to lease Joe Louis Arena and Cobo Arena.

19. Both the Cobo Arena and the Joe Louis Arena are essential facilities in the market for the promotion of arena level concerts.

20. Defendants Brass Ring, Kay and Fox, hereinafter Brass Ring, have monopoly power in the promotion of concerts at the arena level, middle level and club level.

21. The defendants have obtained this monopoly not through superior business acumen but rather through the acquisition of exclusive leases at essential facilities in each sub-market.

22. At the arena level, the Brass Ring defendants have an exclusive at the Joe Louis Arena and Cobo Arena. Plaintiff is precluded from renting those facilities on rental terms that would enable plaintiff to compete against Brass Ring. The Olympia defendants (Olympia, The Building Group, Illitch and Cavalieri) have imposed discriminatorily high rental terms upon the plaintiff that make it impossible for plaintiff to compete against Brass Ring, and has thereby denied access to plaintiff on terms equal to that afforded to Brass Ring.

23. At the middle level, the Brass Ring defendants have monopoly power through the acquisition of exclusive leases at the State Theatre, the Fox Theatre, and Royal Oak Music Theatre.

24. The State and Fox theatres are essential facilities on the middle level sub-market.

25. Defendant Forbes through his ownership of the State and Fox Theatres has monopoly power in the rental of middle level concert facilities.

26. Plaintiff has been denied access to said facilities.

27. At the lower level of club level sub-market, Brass Ring has monopoly power through the acquisition of an exclusive lease at the St. Andrews Theatre.

28. St. Andrews is an essential facility in the lower level or club market.

29. Plaintiff has been denied access to said facility.

30. In addition Brass Ring has interfered with plaintiff's contracts including but not limited to plaintiff's contract with the University of Michigan for the rental of Hill Auditorium.

VI. DAMAGES

31. As a result of the foregoing, plaintiff has been damaged in the amount in excess of $500,000.00.

32. Plaintiff is suffering irreparable harm as a result of the foregoing conduct.

VII. VIOLATION

33. The foregoing conduct violates Section Two of the Sherman Act, 15 U.S.C. Sec. 2.

COUNT TWO
VIOLATION OF THE SHERMAN ACT, SECTION TWO
ATTEMPTED MONOPOLIZATION

34. Paragraphs 1-33 are re-alleged as if set forth in full.

35. The foregoing conduct constitutes . attempted monopolization.

COUNT THREE
VIOLATION OF SHERMAN ACT, SECTION TWO
CONSPIRACY TO MONOPOLIZE

36. Paragraphs 1-35 are re-alleged as if set forth in full.

37. The defendants did conspire amongst themselves and others to monopolize the relevant product sub-markets.

COUNT FOUR
VIOLATION OF THE SHERMAN ACT, SECTION ONE
CONSPIRACY IN UNREASONABLE RESTRAINT OF TRADE

38. Paragraphs 1-37 are re-alleged as if set forth in full.

39. The defendants conspired to unreasonably restrain trade in the promotion of concerts in the relevant sub-markets.

40. The conspiracy consisted of refusing to allow plaintiff access to the referenced facilities on equal terms, interference with prospective and actual contracts of the plaintiff and similar acts.

41. As a result of the foregoing, competition has been unreasonably restrained, in that, among other things:

a. the concert going public has been deprived of the services offered by plaintiff at the foregoing facilities.

b. artists have been deprived of the benefits of competition in the bidding for talent by plaintiff.

c. defendants have gained a monopoly in the relevant sub-markets.

COUNT FIVE
INTERFERENCE WITH CONTRACTUAL RELATIONSHIP

42. Paragraphs 1-41 are re-alleged as if set forth in full.

43. Jurisdiction is pendent.

44. In or about September of 1986 plaintiff entered into an agreement with the University of Michigan for the promotion of a concert at Hill Auditorium.

45. Defendant Brass Ring interfered with the contract by threatening or otherwise inducing the University of Michigan not to perform under the agreement.

46. The foregoing was done with the knowledge of plaintiff's contract rights, and was done intentionally, recklessly and maliciously.

WHEREFORE, PLAINTIFF DEMANDS THE FOLLOWING RELIEF:

A. JUDGMENT IN ITS FAVOR AGAINST EACH DEFENDANT JOINTLY AND SEVERALLY;

B. ACTUAL AND COMPENSATORY DAMAGES AS TO THE DEFENDANTS OTHER THAN THE CITY;

C. PUNITIVE DAMAGES AS TO THE DEFENDANTS OTHER THAN THE CITY;

D. TREBLE DAMAGES;

E. COSTS OF SUIT AND A REASONABLE ATTORNEY'S FEE;

F. PERMANENT INJUNCTIVE RELIEF;

G. SUCH OTHER AND FURTHER RELIEF AS THIS COURT MAY DEEM JUST;

H. PLAINTIFF DEMANDS TRIAL BY JURY.

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APPENDIX M

In The United States District Court

EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN, *Plaintiff,* v. RICK KAY, et al., *Defendants.*	CIVIL ACTION NO. 87 CV 70397 DT

DEFENDANT PROPHET PRODUCTIONS' MOTION FOR SUMMARY JUDGMENT

PROCEEDINGS HAD in the above-entitled matter before the Honorable ANNA DIGGS TAYLOR, United States District Judge of the Eastern District of Michigan, Southern Division, at 737 U.S. Courthouse and Federal Building, 231 Lafayette Boulevard West, Detroit, Michigan, on Monday, September 21, 1987.

APPEARANCES:

STEVEN KRAMER, ESQ.,
On behalf of Plaintiff.

T. PATRICK FREYDL, ESQ.,
On behalf of Defendants Kay, Fox, Forbes, Prophet Production, Tinik, Bannon, and The Building Group.

ALAN C. HARNISCH, ESQ.,
On behalf of Defendants Cavalieri, Illitch and Olympia.

CHARLES A. MOORE, ESQ.,
On behalf of Defendant City of Detroit.

THE COURT: Plaintiff.

MR. KRAMER: Good morning, Your Honor. Steven Karmer on behalf of the plaintiff.

Your Honor, 1 sentence disposes of this motion, and I won't burden the Court with any further statements. That 1 sentence is: *Lawlor versus National Screen Service Corporation*, 349 U.S. 322, (1955), cited in our supplemental papers, disposes of this motion. Shepardizing that 32-year-old case, one concludes that it has not been reversed. It has not been modified. It has ever even been distinguished by the Supreme Court.

That case, discussed at length in our supplemental papers, which Mr. Freydl during the 17 or 18 minutes he was up here failed to mention, is the only Supreme Court case in the United States that has held on this issue.

In that case, like this case, there was a prior suit.

In that case, like this case, there was an antitrust claim in both suits.

In that case, like this case, there was a dismissal with prejudice.

In that case, like this case, a subsequent suit was brought.

In that case, like this case, different time periods and, hence, different cause of actions were alleged —

THE COURT: Well, no, in that case, plaintiffs alleged that National Screen did not live up to its obligations under the settlement agreement, you say.

MR. KRAMER: In addition, Your Honor, and with regard to the antitrust causes of action, the plaintiff in the subsequent case alleged a different time period and the same type of conduct; namely, contending that the exclusive licenses granted to the defendant which were alleged to be unlawful in suit number 1 were also alleged to be unlawful in suit number 2.

Yes, there was a settlement agreement and, yes, the plaintiff in the second suit said they didn't live up to the settlement agreement which formed the basis of the dismissal with prejudice for sure. To be sure, Your Honor's absolutely correct. But with

regard to the antitrust claims, the allegations were exactly the same; namely, whether or not the exclusive licenses were legal. The only difference — and this was critical and determinative, as it will be here — is that different time periods were alleged.

And as Chief Justice Warren — and I won't bother to read it because Your Honor has it before you — said, "Different time periods, end of issue," reverses both lower courts and holds that *res judicata* does not apply, and in addition cites the very cogent policy grounds as to why it should not apply.

Shepardizing that case, the 2 cases that also involved antitrust issues and a prior lawsuit and either a dismissal with prejudice or an adverse ruling againts the plaintiff again hold that *res judicata* does not apply when, as here, different time periods are alleged, and those cases I cite and I won't burden the Court with going over them now because they're set forth in detail.

But here, Your Honor, we are talking about unlawful conduct between 1983, the date of the dismissal with prejudice, and the date of the filing of this lawsuit. In suit number 1, we were talking about a different time period, the 4-year period before that filing of the lawsuit in '83. So you have 2 different time periods here, just like you did in *Lawlor,* just like you did in *General Electric,* and just like you did in the *Oberweis* decision.

In *Lawlor,* in *Oberweis,* and in *General Electric,* the courts held that because different time periods applied, summary judgment and *res judicata* were not applicable.

That's the end of the argument. Thank you, Your Honor.

No. 89-1917

In The

Supreme Court of the United States

October Term, 1989

RICK KAY, ROBERT FOX, ROBERT CAVALIERI, MICHAEL ILITCH, PROPHET PRODUCTIONS, LTD., MICHAEL TINIK, OLYMPIA ARENAS, INC.,

Petitioners,

v.

CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether a lawsuit alleging antitrust violations based upon events occurring subsequent to a dismissal with prejudice of a prior action is barred by the *res judicata* effect of the prior dismissal order.

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No. 89-1917

In The

Supreme Court of the United States

October Term, 1989

RICK KAY, ROBERT FOX, ROBERT CAVALIERI, MICHAEL ILITCH, PROPHET PRODUCTIONS, LTD., MICHAEL TINIK, OLYMPIA ARENAS, INC.,

Petitioners,

v.

CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

COUNTER STATEMENT OF THE CASE

This case involves claims by Cellar Door Productions, Inc. of Michigan ("Cellar Door") that Prophet Productions, Ltd. ("Brass Ring") and Olympia Arenas, Inc. ("Olympia")[1] engaged in activities violative of pertinent antitrust laws in connection with the operation and leasing of Joe Louis Arena and Cobo Arena (the "Arenas"), located in Detroit, Michigan.

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[1] Brass Ring and Olympia will collectively be referred to as "Petitioners".

Cellar Door promotes and produces arena attraction musical events. An arena attraction features a performer potentially capable of selling approximately 10,000 to 20,000 seats for one performance. Typically, the performer will require a financial guaranty for the performance. The amount that a promotion company such as Cellar Door or Petitioners can offer as a guaranty depends upon the lease price that the promotion company can secure from the facility hosting the performance.

The Arenas are owned by the City of Detroit and leased to Olympia through an agreement dated August 16, 1978. Olympia has operational control over the leasing of the arenas for musical events. The Arenas are essential facilities for the promotion and production of arena attraction musical events in the metropolitan Detroit area due to their substantial seating capacity, economic feasibility, and geographic location. The Arenas are the only arena level year-round facilities in the Detroit market.

Cellar Door contends that Petitioners have improperly employed an exclusive arrangement for the promotion of musical events at the Arenas. This arrangement effectively denies Cellar Door access to the Arenas for the promotion and production of musical events. Specifically, as a result of the arrangement, the Arenas are not offered to Cellar Door on the same rental terms as offered to Petitioners. As a result, Petitioners are able to offer performers more compensation and a better financial guaranty for events taking place at the Arenas. The Olympia-Brass Ring arrangement has effectively precluded Cellar

Door from competing with Petitioners in the Detroit market.[2]

As a result of the discriminatory pricing, Cellar Door filed an action in 1983 against Olympia and Brass Ring. Cellar Door moved for an injunction pending trial to enjoin the Defendants from refusing to grant Cellar Door access to the Arenas on equivalent terms to those offered to Brass Ring. The request for injunctive relief was denied.

On September 23, 1983, a meeting was held between Jack Boyle ("Boyle"), Chairman of the Board of Cellar Door, and Robert Cavalieri, as well as other representatives of Olympia. The meeting concerned the pending antitrust lawsuit. It was represented to Boyle that if Cellar Door dismissed the suit it would be granted equal access to the Arenas on non-discriminatory terms. Boyle thereafter instructed his counsel to dismiss the 1983 lawsuit. Subsequently, by stipulation of counsel, an order of dismissal, with prejudice, was entered by the Honorable Anna Diggs Taylor on November 7, 1983.

Following the dismissal of the 1983 lawsuit, Cellar Door obtained equal access for several events at the Arenas in the summer of 1984. Brass Ring and Olympia, however, again began to discriminate against Cellar Door with respect to the rental charges for the Arenas. As a result, Cellar Door found it impossible to compete with

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[2] A party that controls an essential facility and denies other parties access to the facility violates Section 2 of the Sherman Act. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977) *cert. den'd.*, 436 U.S. 956 (1978).

Brass Ring in the Detroit market. Accordingly, the present lawsuit was filed in February 1987. The action complains of antitrust violations committed by Brass Ring subsequent to the dismissal of the 1983 action.

Limited discovery occurred prior to the District Court's grant of summary judgment in favor of Petitioners. Edward Leffler ("Leffler"), a theatrical and personal manager who represents the band Van Halen, testified that, in conjunction with Van Halen's tour in 1986, he desired to book his band at Joe Louis Arena. He stated that there was no viable, practical substitute to Joe Louis Arena for his band in the Detroit area. (App. A, pp. A-2, 3-4).

Leffler testified that the concert was promoted by Brass Ring because that company offered a considerably better deal than anyone else. (App. A, p. A-5). He further testified that he was very reluctant to deal with Brass Ring, due to previous problems he had experienced with that company, but he nevertheless accepted Brass Ring's offer because it was so substantially better than other offers that had been presented. (App. A, pp. A-6-10). Leffler was told by Rick Kay ("Kay") of Brass Ring that Brass Ring had an arrangement with the Arena that made it impossible for anyone else to make Leffler a better offer. (App. A, p. A-11). Leffler testified that, without question, he would have allowed Cellar Door to promote the concert but for the offer made by Kay, which was impossible for Cellar Door to match. (App. A, pp. A-12-13).

Petitioners filed motions for summary judgment in July 1987. The motions were based upon the *res judicata*

effect of the 1983 dismissal with prejudice. In response, Cellar Door's counsel relied on the U.S. Supreme Court decision in *Lawlor v. National Screen Service Corp.*, 349 U.S. 322; 75 S.Ct. 865 (1955). Cellar Door contended that in *Lawlor* the court held, in unequivocal terms, that a stipulation of dismissal with prejudice in an antitrust action does not constitute a bar to new litigation based on subsequent conduct, even if that conduct is essentially the same course of wrongful conduct as set forth in the cause of action dismissed by stipulation. Cellar Door asserted that the present action involves refusals to deal on an equal basis for events that Cellar Door attempted to book in the years subsequent to the dismissal, (i.e., a Van Halen concert in 1986), and that these refusals could not possibly have been sued upon in the original action because they did not occur until several years after the stipulation for dismissal had been entered.

The Court, however, granted Petitioners' motions finding *res judicata* to be applicable. The Court found the matters contested in the present case identical to those adjudicated by the Court in the 1983 action, in that both cases allege that the lease agreement between the City of Detroit and Olympia violated applicable antitrust laws.[3]

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[3] Cellar Door's counsel had explained that it was not the lease that Cellar Door complained of, but rather that Brass Ring and Olympia applied the authority granted under the lease in a discriminatory manner. Nevertheless, the Court granted the motions on the basis that both cases " . . . concern an exclusive lease agreement . . . alleged to have denied plaintiff access to Cobo Hall and Joe Louis Arena . . . " (App. B, p. B-3).

In a decision issued March 8, 1990, the United States Court of Appeals for the Sixth Circuit ("the Sixth Circuit") reversed the District Court's grant of summary judgment. The court concluded that Petitioners' course of conduct could give rise to more than one cause of action. Relying upon *Lawlor*, the Court concluded that the alleged wrongful conduct occurring subsequent to the dismissal of the 1983 lawsuit was not barred by *res judicata* principles, stating:

> In the case before us, Olympia and Brass Ring's course of conduct could give rise to more than one cause of action. Each time the arrangement precluded Cellar Door from competitively bidding for an event, a cause of action may have accrued to Cellar Door. Therefore, as in *Lawlor* and *Cream Top*, those causes of action that arose subsequent to the 1983 dismissal are not barred by *res judicata.*

Petitioners filed a petition for writ of certiorari on June 6, 1990. They contend that the Sixth Circuit decision improperly establishes a "per se rule" that a judgment in one action can never have claim preclusive effect with respect to conduct occurring subsequent to the first action. Cellar Door answers that Petitioners mischaracterize the Sixth Circuit decision, and deny that it establishes such a "per se rule". Moreover, Cellar Door contends that the Sixth Circuit decision is completely consistent with existing law and that Petitioners fail to establish any suitable basis for this court to grant certiorari.

ARGUMENT

A LAWSUIT ALLEGING ANTITRUST VIOLATIONS BASED UPON EVENTS OCCURRING SUBSEQUENT TO A DISMISSAL WITH PREJUDICE OF A PRIOR ACTION IS NOT BARRED BY THE *RES JUDICATA* EFFECT OF THE PRIOR DISMISSAL ORDER.

A. *Lawlor* And Its Progeny.

Both the Sixth Circuit decision and Petitioners' brief focus upon the Supreme Court's decision in *Lawlor*. In *Lawlor*, the plaintiff originally brought an antitrust action in 1942 alleging that its competitor had secured exclusive licenses in the motion picture accessory market, and that those licenses resulted in a monopoly. A year later, the parties settled their dispute, and a dismissal with prejudice was entered. In 1949, the plaintiff brought a second lawsuit alleging antitrust violations occurring subsequent to the dismissal of the 1942 action. The plaintiff named as defendants the three producers who were parties to the 1942 suit, as well as five producers licensed subsequent to the dismissal of the 1942 suit.

The defendants moved for summary judgment on the basis of the *res judicata* effect of the 1942 order of dismissal. The District Court granted the motion and the Third Circuit Court of Appeals affirmed. However, the Supreme Court *reversed*. In no uncertain terms, the Supreme Court held that in the context of continuing antitrust violations, a stipulation for dismissal with prejudice does not constitute a bar to new litigation based upon subsequent conduct, even if that conduct is essentially the same as that alleged in the original lawsuit and covered by the stipulation and order of dismissal.

In so holding, the *Lawlor* court initially recognized that under the doctrine of *res judicata*, a judgment "on the merits" in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. *Lawlor*, at 326. Accordingly, the Court characterized the issue before it as "whether the plaintiffs in the present suit are suing upon the 'same cause of action' as that upon which they sued in 1942." *Lawlor, Id.* The Court then stated that the trial court erred in concluding that the 1942 and 1949 suits were based on the same cause of action:

> *That both suits involved 'essentially the same course of wrongful conduct' is not decisive.* Such a course of conduct – for example, an abateable nuisance – may frequently give rise to more than a single cause of action. And so it is here. The conduct presently complained of was all subsequent to the 1943 judgment. In addition, there are new antitrust violations alleged here . . . not present in the former action. While the 1943 judgment precludes recovery on claims arising prior to its entry, *it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case.*

(Emphasis provided). *Lawlor*, at 327-328.

The Court emphasized the public policy support for allowing the plaintiff to proceed with the 1949 lawsuit:

> Particularly is this so *in view of the public interest in vigilant enforcement of the antitrust laws* through the instrumentality of the private treble-damage action. Acceptance of the respondant's novel contention would in effect confer on them a partial immunity from civil liability for future violations. Such a result is consistent

> with neither the antitrust laws nor the doctrine of *res judicata.*

(Emphasis provided). *Lawlor,* at 329.

As noted by the Sixth Circuit, the direct application of the *Lawlor* decision to the present case is inescapable. Both cases involve:

(1) a prior antitrust lawsuit;

(2) a dismissal of the prior suit upon stipulation, with prejudice;

(3) an entry of the dismissal order unaccompanied by findings of fact, and hence, not binding on the parties on any issue;

(4) a second suit based upon antitrust violations occurring subsequent to the entering of the order of dismissal in the original lawsuit.

The *Lawlor* doctrine rejecting the defense of *res judicata* has been consistently applied in actions alleging a continuing scheme to violate antitrust laws subsequent to a prior dismissal order. For example, in *Cream Top Creamery v. Dean Milk Co.,* 383 F.2d 358 (6th Cir. 1964)[4], the Sixth Circuit relied upon *Lawlor* in reversing the District Court's grant of summary judgment in favor of the defendants based upon a *res judicata* defense.

In *Cream Top,* the plaintiffs filed an antitrust suit alleging that the defendants participated in a continuing restraint of trade affecting the sale of dairy products. Specifically, plaintiffs alleged the defendants discriminated systematically in pricing among their customers in

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[4] Here, the Sixth Circuit placed appropriate reliance on the *Cream Top* decision.

order to create a monopoly in certain markets. The plaintiffs had been parties to a previous state court antitrust action based upon the same allegations against the same defendants, entitled *Cherokee Sanitary Milk Co. v. Dean Milk, Inc.* (hereinafter referred to as "Cherokee"). A dismissal with prejudice was entered in Cherokee. In *Cream Top,* the District Court granted defendant's motion for summary judgment, holding that the dismissal with prejudice of Cherokee was tantamount to a trial and final judgment and hence was *res judicata.*

The Sixth Circuit reversed, based upon *Lawlor*:

> Further, it is our opinion that the doctrine of *res judicata* is not applicable in the present case. As the Supreme Court stated in *Lawlor, supra,* the fact that 'both suits involved 'essentially the same course of wrongful conduct' is not decisive. Such a course of conduct – for example, an abateable nuisance – may frequently give rise to more than a single cause of action.' (Citation omitted.) Here the amended complaint in the *Cream Top* case charges that Dean made unlawful sales at discriminatory prices . . . beginning in 1952 and continuing up to the date of the second amended complaint in 1964. *At least insofar as the complaint alleges violations since the dismissal of the Cherokee case, the judgment in that case cannot be given the effect of extinguishing a claim which arose subsequent to that judgment. Lawlor v. National Screen Service, supra.*

(Emphasis provided). *Cream Top,* at 363.

Importantly, the *Cream Top* court concluded its opinion by stating:

> With respect to the allegations of price discrimination, it is to be emphasized that *this is not an action based upon a single wrongful transaction*

> *from which continuing damages may have resulted. The wrongful conduct charged in this case is composed of a multitude of separate transactions alleged to have been discriminatory.* Each such transaction or group of transactions, if proved to have the effects proscribed by the Robinson-Patman Act, might be held to be a separate legal wrong.

(Emphasis provided). *Cream Top,* at 364.

Similarly, in the present case the wrongful conduct charged is composed of a multitude of separate transactions involving events booked by Petitioners at the Arenas subsequent to 1983. Each such occurrence, if proven by Cellar Door to be violative of applicable antitrust laws, constitutes a separate actionable legal wrong.

A similar ruling was rendered in *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.,* 669 F.2d 490, 494 (7th Cir. 1982). There, the plaintiff filed suit in 1971 alleging that the defendant was engaged in a scheme to allocate markets in violation of the Sherman Act. A trial was held, and the jury returned a verdict in favor of the plaintiff. Subsequently, plaintiff filed a motion requesting the District Court to award it supplemental damages based upon post-verdict conduct of the defendant. The District Court denied the motion on the ground that plaintiff had two pending lawsuits against defendant in which it sought damages for antitrust violations occurring subsequent to the judgment. On appeal, the Seventh Circuit held that a cause of action accrued to the plaintiff each time the defendant engaged in antitrust conduct causing harm, and therefore, the plaintiff was entitled to maintain an independent cause of action for damages caused by antitrust conduct occurring subsequent to the initial judgment. *Ohio-Sealy,* at 494.

Another dispositive antitrust decision was rendered by the Court in *United States v. General Electric Co.*, 358 F.Supp. 731 (D.C. N.Y. 1973). In that case, the government brought an action against General Electric attacking its lamp agency marketing system. The system had been attacked in three previous actions, each of which resulted in a decision in favor of General Electric. General Electric raised the defense of *res judicata* to the 1973 action, relying upon the decisions in the three previous cases. In denying the applicability of the doctrine, the Court stated:

> The *res judicata* rule that a judgment on the merits is a bar to a subsequent action between the same parties applies *only* where the subsequent action is upon the same cause of action. In the case at bar, as I view it, the cause of action sued upon is not the same but is different from the causes of action sued upon in the prior General Electric cases. The doctrine of *res judicata* as an absolute bar therefore does not apply here.
>
> * * *
>
> In the case at bar, as in *Lawlor*, the course of conduct complained of occurred subsequent to the judgments in the prior suits. The same public policy considerations against giving a defendant immunity – in fact, perpetual immunity – from liability, for such violations in the future is present here. *Here, as in Lawlor, while the course of conduct alleged may be a continuing one, the cause of action is not the same but different* from that on which the judgments in the 1926 and 1949 actions were rendered.

(Emphasis provided). *General Electric*, at 739-740.

Lawlor was again followed in the context of an antitrust action in *Oberweis Dairy, Inc. v. Associated Milk Producers, Inc.*, 576 F.Supp. 1559 (D.C. Ill. 1984). Oberweis sued Associated Milk in 1972 alleging violations of the Sherman Act. It had previously instituted an antitrust action against Associated Milk's predecessor in 1965. In the initial case, the parties agreed to a resolution, and the action was dismissed with prejudice on August 26, 1969. In denying a motion for summary judgment based upon *res judicata* brought by Associated Milk in the 1972 lawsuit, the court stated:

> But to the extent (as is assumed for current purposes) the 1972 lawsuit is based on post-August 26, 1969 conduct, it fits within the precise situation defined in *Lawlor*.

Oberweis, at 1562.

These cases illustrate the uniform application of *Lawlor* in cases involving allegations of continuing antitrust violations. The Courts that have relied upon *Lawlor* in antitrust cases have found little, if any, difficulty with its application. Here, the Sixth Circuit properly found *Lawlor* to be dispositive. Petitioners cite no valid grounds for this Court to either reassess *Lawlor* or review the propriety of the Sixth Circuit's decision.

B. The Sixth Circuit's Decision Does Not Establish A "Per Se Rule".

Petitioners contend that the Sixth Circuit's holding establishes a per se rule which conflicts with the "better view" of Lawlor and the law of other circuits. In so arguing, Petitioners assert that the decision is based on

the proposition that a judgment in one action can never have a claim preclusive effect with respect to conduct occurring subsequent to that action. Petitioners' position, however, mischaracterizes the Sixth Circuit's ruling.

Rather than relying exclusively on the time element in determining that *res judicata* does not bar Cellar Door's action, the Sixth Circuit properly focused upon the nature of the ongoing conduct complained of by Cellar Door:

> In the case before us, Olympia and Brass Ring's course of conduct could give rise to more than one cause of action. Each time the arrangement precluded Cellar Door from competitively bidding for an event, a cause of action may have accrued to Cellar Door. Therefore, as in *Lawlor* and *Cream Top*, those causes of action occurring subsequent to the 1983 dismissal are not barred by *res judicata*.

Neither *Lawlor* nor the Sixth Circuit either alluded to or established a "per se rule" which establishes the element of time as preemptively dispositive on the issue of the similarity of the claims. Therefore, Petitioners clearly misconceive the rationale behind the Sixth Circuit's decision, or attempt to mischaracterize it in a harsh and rigid manner in order to draw the attention of this Court. In either case, it is clear that the "per se rule" argument that permeates Petitioners' brief is meritless and provides no basis for this Court to review the Sixth Circuit's decision.

C. The Sixth Circuit's Decision Does Not Conflict With Other Circuits.

Petitioners' averment that the Sixth Circuit's decision has either been rejected by or conflicts with decisions in

other circuits relies improvidently upon Petitioners' contention that the decision hinges upon the so-called "per se rule". In the absence of this misconstruction of the Sixth Circuit's holding, it becomes clear that the decision is both consistent with and supported by decisions rendered in other circuits.[5]

The cases relied upon by Petitioners to establish a purported conflict are readily distinguishable. Petitioners place heavy reliance upon *Engelhardt v. Bell & Howell Company*, 327 F.2d 30 (8th Cir. 1964). In *Engelhardt*, the plaintiff brought a succession of lawsuits arising out of the defendant's alleged breach of a "retail dealer franchise agreement". Importantly, the case involves a single breach of contract, one and only one refusal to deal, and thus only one transaction. Thus, the Sixth Circuit properly found *Engelhardt* to be nondispositive.[6]

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[5] See *Singer Company v. Skil Corporation*, 803 F.2d 336, 343 (7th Cir. 1986); *Blair v. City of Greenville*, 649 F.2d 365, 368 (5th Cir. 1981); *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp.*, 421 F.2d 1313 (5th Cir. 1970), cert. denied 400 U.S. 991, 91 S.Ct. 454 (1971); *Page v. United States*, 729 F.2d 818, 820 (D.C. Cir. 1984); *Ohio-Sealy Mattress Manufacturing Company v. Sealy, Inc.*, 669 F.2d 490, 494 (7th Cir. 1982); *Ohio-Sealy Mattress Manufacturing Corporation v. Kaplan*, 745 F.2d 441, 448 (7th Cir. 1984); *Davis v. Halpren*, 813 F.2d 37, 40 (2nd Cir. 1987); *United States v. General Electric Company*, 358 F.Supp. 731, 739-40 (D.C. N.Y. 1973); *Warrington USA, Inc. v. Allen*, 631 F.Supp. 1456, 1460 (D.C. Wis. 1986); *Car Carriers, Inc. v. Ford Motor Company*, 789 F.2d 589, 591 (7th Cir. 1986); *International Railways of Central America v. United Food Company*, 373 F.2d 408, 419 (2nd Cir. 1967, cert. denied, 387 U.S. 921 (1967); *Carter-Wallis, Inc. v. United States*, 449 F.2d 1374, 1386-1388 (Court of Claims 1971).

[6] *Engelhardt* was similarly distinguished by the Court in *General Electric* at 740 and *Exhibitors Poster* at 1318.

In a statement of minor import to its decision, the *Engelhardt* court expressed the belief that the Supreme Court in *Lawlor* based its rejection of *res judicata* upon the addition of new defendants and allegations of a new antitrust violation occurring subsequent to the determination of the prior litigation. This dicta has been largely ignored or rejected by other courts[7], and certainly does not support Petitioners' contention that a material split exists among the circuits concerning the interpretation of the *Lawlor* decision.

Petitioners next rely upon *Peugeot Motors of America, Inc. v. Eastern Auto Distributors, Inc.*, 892 F.2d 355 (4th Cir. 1989). This reliance, however, is misplaced. The glaring distinction between *Peugeot* and the present case is that the initial *Peugeot* litigation involved a trial and factual disposition of Peugeot's claims. In this regard, the Court in *Peugeot* noted that the disputed counterclaim involved allegations of continuing actions on the part of Peugeot which were litigated in a prior suit but continued to the present suit. *Peugeot*, at 359. The Court therefore opined:

> We do not believe that the mere fact that Peugeot's questioned policies continued after the 1981 litigation allows Eastern to make the same legal claim about the same policies that were litigated and on account of which relief was denied in prior litigation. *Peugeot*, *Id.*

Here, in contrast, the dismissal of the first lawsuit did not establish the appropriateness of Petitioners' actions. The District Court did not make any factual findings in the initial lawsuit that preclude Cellar Door

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[7] *General Electric*, at 740.

from litigating the impropriety of the Brass Ring-Olympia relationship.[8]

Significantly, the *Peugeot* Court neither mentioned nor attempted to interpret the *Lawlor* decision. Presumably, the absence of a discussion of *Lawlor* stemmed from the critical procedural distinction between *Peugeot* and *Lawlor*. *Peugeot* obviously turned upon the factual determinations made in the first action, while neither *Lawlor* nor the present case involve this type of consideration. In any event, *Peugeot* clearly does not involve a conflicting interpretation of *Lawlor*, as represented by Petitioners.

Next, Petitioners rely upon *Walsh v. International Longshoremen's Association, AFL-CIO Local 799*, 630 F.2d 864 (1st Cir. 1980). Again, *Walsh* fails to support the purported conflict that Petitioners attempt to create. *Walsh* involves the distinctive issue of the *res judicata* effect of a district court's determination on a petition for the imposition of preliminary injunctive relief pursuant to Section 10(l) of the National Labor Relations Act. Section 10(l) requires the request for a preliminary injunction in order to preserve the status quo until a decision has been made by the NLRB regarding the unfair labor practice charged. The court does not decide whether an unfair labor practice has occurred, but only the narrow issue of whether there is reasonable cause to believe that a violation has taken place warranting injunctive relief. *Walsh*,

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[8] Indeed, the District Court rejected Brass Ring's counsel's assertion during oral argument that this case involves the continuation of conduct which the court deemed lawful through the 1983 dismissal, stating: "Well, this court didn't deem it anything. It hasn't been deemed lawful. * * * I think you're mixing apples and oranges, because the conduct hasn't been adjudicated lawful, you see." (App. B, p. B-2-3).

accordingly, involved the peculiar application of *res judicata* principles to a district court's determination on the injunctive relief issue.

Moreover, the *Walsh* court expressly commingled the concepts of claim preclusion and collateral estoppel,[9] and actually decided the case based on collateral estoppel grounds. Here, it is beyond dispute that principles of collateral estoppel have no application. Importantly, the *Walsh* court declined to determine whether the case before it alleged identical causes of action as prior suits involving requests for injunctive relief, since the court made its decision based upon the collateral estoppel effect of a prior court's determination. *Walsh*, at 873-74.

Notably, *Walsh* involved a singular core event, i.e., the directive of the International Longshoremen's Association that members should cease handling cargos bound for or arriving from the USSR in light of that nation's invasion of Afghanistan. Here, Cellar Door complains not of a singular pronouncement by Petitioners, but rather their ad hoc, event by event practice of imposing discriminatory pricing on Cellar Door. Thus, *Walsh* involves neither analogous facts nor a conflicting application of *Lawlor*.

Finally, Petitioners rely upon *Neeld v. National Hockey League*, 439 F.Supp. 446 (W.D. N.Y. 1977). This case arose out of a National Hockey League ("NHL") rule prohibiting the eligibility of players with one eye. The plaintiff initially filed an action in the United States District Court in California ("the California action") against the same

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[9] *Walsh* at 867, footnote 5.

defendants challenging the propriety of the by-law. The court in the California action granted summary judgment, holding the by-law to be a reasonable restraint of trade. The plaintiff then filed a second action challenging the continued refusal of the NHL to allow his participation. The defendants urged that the California action barred the second case on *res judicata* principles. The court opined:

> In the case at hand, plaintiff merely alleges that defendants have continued to adhere to the Section 12.6 and have continued to utilize the amateur draft system for selecting new players, which adherence and utilization by defendants existed at the time of the California action. *There are no allegations that such conduct by defendants is not the same as had occurred prior to judgment in the California action.* Thus, I conclude that plaintiff's continuing violation theory has no place in determining whether any counts of the instant complaint are barred by *res judicata.*

(Emphasis provided). *Neeld,* at 452-453.

This holding does not create a conflicting interpretation of *Lawlor,* since *Lawlor* did involve allegations of wrongdoing by the defendants occurring subsequent to the voluntary dismissal. Moreover, as with *Walsh, Neeld* involves the application and propriety of a singular rule or directive. Here, Cellar Door complains not of such a proscription, but rather a number of separate instances of unlawful price discrimination.

The smokescreen that Petitioners attempt to create concerning a conflict among the circuits quickly evaporates upon a careful reading of the cited cases. The only arguable conflict arises from the discredited *Englehardt*

dicta which interprets *Lawlor's* rejection of *res judicata* as being dependent upon the addition of new defendants and new antitrust violations occurring subsequent to the initial litigation. This dicta is loosely referenced in subsequent cases but has never been found to be controlling. In fact, the circuits have been strikingly consistent in their application of *Lawlor*, especially in cases involving antitrust violations occurring subsequent to the dismissal of a first lawsuit. The circuits have applied the *Lawlor* holding uniformly and with relative ease. Consequently, no reason exists for this court to reexamine the *Lawlor* doctrine at this time.

D. No "Uncertainty Exists In The Circuits" As To The *Lawlor* Holding.

Petitioners argue that various circuits have expressed a good deal of uncertainty on the issue of the scope of claim preclusion in cases involving continuing conduct. Similar to Petitioners' "conflict" argument, a careful reading of the relied upon cases reveals a lack of foundation for this premise.

Petitioners aver that the Federal Circuit's decision in *The Young Engineers, Inc. v. International Trade Commission*, 721 F.2d 1305 (Fed. Cir. 1983) "suggests that the Federal Circuit found the broad view of *Lawlor* . . . hospitable."[10] The language of Petitioners' argument, alone, illustrates the weakness of its position. As with *Walsh* and *Neeld*, *Young Engineers* is so factually dissimilar from the present case that neither its holding nor dicta lend any support to Petitioners' futile argument.

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[10] Brass Ring-Olympia Brief at p. 14.

Young Engineers involves the *res judicata* effect of a prior patent infringement lawsuit on proceedings before the International Trade Commission ("ITC"). The defendant argued that the ITC's investigation involved a continuing course of conduct which was the same as that attacked in prior civil litigation. The court noted that even if it were to apply a broad view of claim preclusion, no authority existed to apply the doctrine to conduct of a different nature from that involved in the prior litigation. *Young Engineers, Inc.*, at 316. The court then held that an infringement claim, for purposes of claim preclusion, does not embrace more than the specific device before the court in the first suit. Since the ITC found the devices at issue to be "new models", the court found the defendant's position untenable. *Young Engineers, Id.*

If anything, *Young Engineers* supports the Sixth Circuit's decision, since the court refused to apply *res judicata* to new alleged instances of patent infringement occurring subsequent to the initial dismissal with prejudice. Similarly, the Sixth Circuit found that each post-dismissal ad hoc imposition of discriminatory pricing against Cellar Door by Petitioners constituted distinct causes of action not precluded by Cellar Door's first lawsuit. The fact that the *Young Engineers'* court noted that the defense of *res judicata* would not apply "even under a broad view of claim preclusion" certainly does not exhibit confusion as to the scope of the *Lawlor* decision. The finding of the *Young Engineers'* court is consistent both with *Lawlor* and the Sixth Circuit's holding in the present case.

Petitioners' reliance upon *California v. Chevron Corp.*, 872 F.2d 1410 (9th Cir. 1989) as supportive of its contention that uncertainty exists as to the application of *Lawlor*

is particularly surprising. *Chevron* indicates neither confusion nor conflict with the *Lawlor* decision. In *Chevron,* the court stated:

> A judgment covering an earlier time period need not necessarily operate as a *res judicata* bar to a lawsuit covering a later period even though both suits involve essentially the same course of wrongful conduct. (*Lawlor* citation omitted). Simply alleging the same type of claims against the same defendants for a later period does not guaranty a *res judicata* bar, because factual matters, such as the conduct of the parties since the first judgment, must be considered.

(Citations omitted). *Chevron,* at 1415.

This opinion is completely consistent with *Lawlor* and the Sixth Circuit decision. The first sentence establishes that the dismissal of an initial lawsuit does not necessarily bar a second lawsuit covering a later period of time. The second sentence points out that the time period, alone, is not the only factor, but the type of conduct involved must also be considered. This analysis *was* conducted by the Sixth Circuit and in *Lawlor.* Neither court imposed a "per se rule" involving solely an analysis of the involved time period, but rather examined the nature of post-dismissal violations of antitrust laws and found that each violation constituted a distinct cause of action.

Similarly, Petitioners' dependence upon *Harkins Amusement Enterprises v. Harry Nace Co.,* 890 F.2d 181 (9th Cir. 1989) is misplaced. The *Harkins'* decision is in complete accord with *Lawlor* and exhibits no confusion or uncertainty:

> *It is elementary that new antitrust violations may be alleged after the date covered by decision or settlement of antitrust claims covering an earlier period.* (Citations, including *Lawlor*, omitted). Failure to gain relief for one period of time does not mean that the plaintiffs will necessarily fail for a different period of time. (*Lawlor* citation omitted). As Areeda puts it: *"It cannot be emphasized too strongly that the continuation of conduct under attack in a prior antitrust suit is generally held to give rise to a new cause of action."* 2 P. Areeda and D. Turner, *Antitrust Laws* § 323c 1978 (footnote omitted). The defendants by winning *Harkins* I did not acquire immunity in perpetuity from the antitrust laws. (*Chevron* citation omitted).

(Emphasis provided). *Harkins*, at 183.

Petitioners place undue reliance on the remark by the *Harkins'* court that the facts in *Harkins* II "are at least ten percent different from the facts alleged in *Harkins* I". Petitioners omitted from their citation the remainder of that sentence, wherein the Court continued "and, of course, the plaintiff alleges conduct that occurred in a different time period." This pronouncement illustrates that *Harkins* falls directly within the *Lawlor* holding.

The fatal flaw in Petitioners' attempt to create uncertainty or a conflict among the circuits emanates from its ill-fated attempt to classify the Sixth Circuit's holding as a "per se rule" that eliminates the applicability of claim preclusion to any conduct occurring after an initial dismissal order. To the contrary, the Sixth Circuit made no attempt to establish a "per se rule", but rather focused on the unique nature of the ongoing conduct complained of by Cellar Door, as well as the generic nature of a continuing scheme to violate antitrust laws. Relying upon

Ohio-Sealey and *Cream Top*, the Sixth Circuit opined that in the context of a continuing scheme to violate antitrust laws, a cause of action accrues to the plaintiff each time the defendant engages in antitrust conduct and harms the plaintiff:

> Thus, Olympia's and Brass Ring's course of conduct could give rise to more than one cause of action. Each time their arrangement precluded Cellar Door from competitively bidding for an event, a cause of action may have accrued to Cellar Door. Those causes of action accruing subsequent to the 1983 dismissal are, therefore, not barred by *res judicata*.

E. The Sixth Circuit's Decision Is Not Incompatible With Modern Conceptions Of Claim Preclusion.

Petitioners aver that the purported lower court confusion concerning *Lawlor* stems from a "dramatic transformation" in the law of *res judicata*, as exemplified by the Restatement Judgments (2nd) ("Second Restatement"). Petitioners argue that the Second Restatement manifests a significantly broader and more flexible approach to claim preclusion. According to Petitioners, under the Second Restatement approach, preclusion generally applies to rights that arise out of the same "transaction, or series of connected transactions." Petitioners argue that the Sixth Circuit's decision is suspect since it fails to cite or apply the Second Restatement or transactional test. Conspicuous by its absence is any analysis by Petitioners establishing that either the Sixth Circuit's holding or the *Lawlor* court's rationale are in any way inconsistent with the "transactional analysis test."

Implicitly, if not explicitly, the *Lawlor* court recognized the separate transactional character of the post-dismissal antitrust violations in holding antitrust laws, a cause of action accrues to the plaintiff each time the defendant engages in antitrust conduct that harms the plaintiff. In fact, *Lawlor* was cited for that very proposition by the court in *Ohio-Sealy*. In reliance upon *Lawlor*, the court in *Ohio-Sealy* stated:

> If the defendant continues the same scheme to violate the antitrust laws after trial, a new cause of action accrues to the plaintiff for any damages caused by the defendant's post-verdict antitrust conduct. *Lawlor v. National Screen Service Corp.*, 49 U.S. at 327-28, 75 S.Ct. at 868. In that instance, the plaintiff is entitled to file a new lawsuit to recover these post-verdict damages. *Id.*
>
> * * *
>
> . . . For those damages that *Ohio* seeks which were caused by antitrust conduct occurring after the verdict in this case, *Ohio* has an independent cause of action that it may pursue in another lawsuit. (*Lawlor* citation omitted). *Ohio-Sealy*, at 494.

Petitioners' argument is also contradicted by the continued adherence to the *Lawlor* decision by all courts, including the Sixth Circuit, subsequent to the date after which Petitioners question *Lawlor*'s applicability due to the "transformation" of the law of claim preclusion.[11]

Petitioners' reliance upon the Second Restatement is misplaced. Petitioners refer to the Second Restatement

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[11] See cases cited in footnote 2.

§ 24 in support of their contention that an identity of the causes of action exists with respect to the first and second lawsuits. Significantly, Petitioners fail to reference illustration 12 under § 24:

> "The government fails in an action against a defendant under an antitrust statute for lack of adequate proof that the defendant participated in a conspiracy to restrain trade. *The government is not precluded from a second action against the same defendant in which it relies on conspiratorial acts post-dating the judgment in the first action,* and may rely also on facts preceding the judgment insofar as these lend significance to the later acts." (Emphasis provided).

Second Restatement, at 204.

Contrary to Petitioners' contention, the Sixth Circuit's decision is perfectly consistent with illustration 12. Presumably, Petitioners' failure to recognize this compatibility stems from its lack of recognition that the Sixth Circuit's decision does not establish a "per se rule", as so vigorously argued by Petitioners. Rather, the Sixth Circuit's holding is reliant upon the separate transactional nature of the antitrust violations alleged by Cellar Door to have occurred subsequent to the dismissal of the initial lawsuit.

Brass Ring and Olympia's current posture with respect to "the arrangement" obviously attempts to portray their conduct as involving merely a single business transaction in order to support an application of *res judicata* principles. To the contrary, Brass Ring and Olympia previously denied the existence of a firm arrangement,

and characterized their dealings as consisting of "ad hoc" decisions to co-promote specific events.[12]

Each event-by-event agreement that effectively precluded Cellar Door from competing on equal terms to promote a particular event established the basis for a cause of action in Cellar Door's favor. Leffler's deposition testimony illustrates the manner in which Brass Ring and Olympia's conduct denied Cellar Door equal access for a concert in 1986. Brass Ring and Olympia may have acted to unfairly eliminate Cellar Door's competition in a different manner with respect to other proposed events. Each time Brass Ring and Olympia acted to preclude

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[12] Robert Fox, Brass Ring's president, stated in an affidavit filed in the first action:

> This . . . it was finally agreed that Brass Ring would attempt to co-promote with the Olympia Organization on an *ad hoc* basis for particular acts which were targeted to be enticed into the downtown facilities . . . it was decided that either party would have the option to participate or not participate based upon the merits of each individual proposed event. (App. C, p. C-2-3).

Likewise, in response to paragraph 12A of Cellar Door's complaint, Olympia averred:

> Answering . . . the defendants deny that OAI has entered into a joint venture with Brass Ring. Rather, in late 1982, OAI and Brass Ring decided to jointly promote musical events in order to compete with Pine Knob during the summer, 1983 season. Their agreement has only been used in a limited fashion and it has been on a [sic] event by event basis with no agreement to continue for any length of time. (App. D, p. D-2).

Cellar Door from competitively bidding for an event, through the imposition of discriminatorily high rental prices, a cause of action accrued to Cellar Door.[13]

F. A Number Of Important Policies Dictate Against A Grant Of The Petition For Writ Of Certiorari.

This Court has not been inclined to grant certiorari to resolve alleged conflicts among appellate courts over issues that are unlikely to recur or result from a unique factual situation. Nor will differences between two circuits likely be accepted as a sufficient conflict if they can fairly be accounted for on the basis of variations in the factual situations among the cases involved. The Court's tendency has been to accept cases for review only when they present a conflict among circuits as to an important federal question. Increasingly, the Court has shaped its case load toward constitutional and related issues. 13 *Moore's Federal Practice* (2d ed.) pp. 17-21, 22, 39, citing *Harlan*, "Manning the Dikes", 13 Record NYCBA 541, 551-552 (1958).

Here, none of these considerations is present. The Sixth Circuit decision involves neither a material or significant conflict among appellate courts nor an important federal or constitutional question. Moreover, the unique factual circumstances involved in the dispute between Brass Ring-Olympia and Cellar Door makes this case unsuitable for the Court to establish a precedential ruling. Furthermore, *Lawlor* and its progeny establish more

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[13] *Ohio-Sealy*, at 494; *Cream Top* at 363.

than a sufficient basis to guide federal courts on the application of *res judicata* in successive antitrust lawsuits.

Furthermore, the Sixth Circuit decision does not pose a danger to "settlements", as argued by Petitioners, or the policy favoring finality of lawsuits. The first Cellar Door lawsuit did not involve a "settlement", but rather an unfulfilled agreement by Olympia to open the Arenas to Cellar Door. Moreover, the dismissal with prejudice did extinguish Cellar Door's right to sue the Petitioners for the wrongful conduct that occurred prior to the entry of the order. Consequently, Petitioners did obtain finality as to occurrences that preceded the dismissal of the first lawsuit. Additionally, Petitioners do not face the prospect of unending litigation with respect to their practices in connection with the leasing of the Arenas. A determination in this lawsuit as to the legality of these practices certainly, at the very least, will have collateral estoppel effect that can be relied upon by all parties regarding future conduct.

Finally, the important public policy favoring the vigilant enforcement of antitrust laws clearly is enhanced by the Sixth Circuit's decision. The dismissal of the first lawsuit should not, as Petitioners would have this Court rule, arm Petitioners with perpetual immunity from antitrust violations, especially in view of the fact that the District Court made no findings as to the propriety of Brass Ring and Olympia's conduct. The *Lawlor* court placed strong emphasis on this consideration, and concluded that extending the *res judicata* defense in the manner urged by Petitioners would create a result "consistent

with neither the antitrust laws nor the doctrine of *res judicata*." *Lawlor*, at 329.[14]

CONCLUSION

Cellar Door respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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[14] A more detailed reference to the *Lawlor* court's discussion of this public policy is found at pages 8-9 of this brief.

No.

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1989

RICK KAY, ROBERT FOX, ROBERT CAVALIERI, MICHAEL ILITCH, PROPHET PRODUCTIONS, LTD., MICHAEL TINIK, OLYMPIA ARENAS, INC.,

Petitioners,

v.

CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN,

Respondent.

APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN, a Michigan corporation, Plaintiff, vs. RICK KAY, ROBERT FOX, ROBERT CAVALIERI, CHARLES FORBES, MICHAEL ILITCH, OLYMPIA STADIUM, CORPORATION, a Michigan corporation, et al., Defendants.	No. 87-CV-70397DT Hon. Anna Diggs Taylor

DEPOSITION OF EDWARD LEFFLER

Los Angeles, California

August 1, 1987

CERTIFIED COPY

SYLVIA BECKER & ASSOCIATES, INC.
CERTIFIED SHORTHAND REPORTERS
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* * *

(p. 8) Van Halen would play on that tour?

A. Absolutely.

Q. And what opinion did you have as to the appropriate facility for Van Halen to play on that tour for the Detroit market?

MR. HARNISCH: Objection; lack of foundation.

BY MR. KRAMER:

Q. You may answer.

Off the record.

(Discussion off the record.)

THE WITNESS: Would you re-ask the last question.

MR. KRAMER: Miss Reporter, please.

(Record read.)

THE WITNESS: My opinion was that they should play Joe Louis Arena.

BY MR. KRAMER:

Q. And would you tell Judge Taylor and the jury why.

A. Because it was –

MR. HARNISCH: I'm going to interpose the same objection.

BY MR. KRAMER:

Q. Yes. Go ahead.

A. Because it was the largest venue that wasn't too large a venue in the Detroit marketplace and was also

* * *

(p. 11) THE WITNESS: The reason is that the audience and the fans expect a band that they gave – if they're that big, they should play the biggest place that they – that they can; A, so more people can see them; and B, so that they're not thought of as less than some other band. That people would question why Van Halen didn't play – if they played a 4,000-seat theater, why they weren't playing a bigger place, where actually the audience themselves are used to going and seem to like to go.

BY MR. KRAMER:

Q. In your experience, Mr. Leffler, with regard to the Detroit market, for a band such as Van Halen that is capable of filling the Joe Louis Arena, is there a, in real life, viable, practical substitute for the Louis Arena in the Detroit market?

MR. HARNISCH: I –

MR. KRAMER: You have a continuing objection.

MR. HARNISCH: Thank you.

THE WITNESS: In my opinion, no. There is a larger facility which is Pontiac Stadium, but I think Pontiac is too big.

BY MR. KRAMER:

Q. Could you explain to the court and the jury why, in your view, for an act such as Van Halen, there is no viable, practical substitute to Joe Louis Arena for a (p. 12) band such –

MR. HARNISCH: Same objection.

MR. KRAMER: Continuing objection.

THE WITNESS: I can't say that it's my opinion there is none for an act of that stature. Joe Louis is the best place to play.

For instance, we could play Cobo Hall. And I believe, prior to me managing Van Halen, they – Van Halen, the tour before, did play Cobo Hall. Whether it was a question of availability of the facility or not, I don't know. I don't know.

But when you schedule a tour and you tour around the whole country, the artists themselves do have a tendency of getting tired, so you only have them for a certain amount of days. So when you lay a tour out, you try and lay it out to maximize in every area of the country that there are appearances. To me, it's within the realm of what is feasible and best for the artist. Joe Louis is truthfully the only choice in Detroit that I would make.

BY MR. KRAMER:

Q. Mr. Leffler, would it be a viable substitute, as the manager of Van Halen, for you to have presented to you Pontiac Silverdome in, let's say a configuration which would have a 20,000-seat capacity or approximately a 20,000-seat capacity?

* * *

(p. 14) Boston at one time on – they played Pontiac Stadium, and I think they did – I don't remember the numbers, 40 or 50,000 people, and they came back and tried to play a couple nights at Cobo Hall, and the first time anywhere on their tour, they didn't sell Cobo Hall out. They did two nights, and I think the second night was not sold out. So I felt at that time it tarnished the image of the band Boston, for that moment, anyway.

Q. Thank you, sir. For whom did you play – when I say "you," Van Halen – at Joe Louis Arena in May of 1986?

A. Brass Ring.

Q. And do you recall why you decided to play for Brass Ring on that date in Detroit at Joe Louis Arena?

A. They made me an offer that, on behalf of my fiduciary relationship with my band, I – it was considerably a better deal than anyone else offered.

Q. And did you receive some offer from Cellar Door for that date? And was the Brass Ring offer better than Cellar Door's worse than Cellar Door? How did it compare to the Cellar Door offer?

A. It was substantially better.

Q. With whom did you discuss the proposed date at Brass Ring?

A. Rick Kay.

* * *

(p.16) can't – I would think it was somewhere – November, December of 1985, I guess, but I could be wrong. I'm not sure.

The first conversation was by phone.

Q. Did he call you or did you call him?

A. He called me.

Q. He called you. Okay. What did he say when he called you?

A. "I'd like to play Van Halen in Detroit?"

Q. And do you recall what you said to him?

A. Would you hold for a second. I'm about to use some vile language, if you don't mind.

Q. The court reporter understands you're under oath and obligated to tell exactly what was said, to the best of your recollection, Mr. Leffler. The judge understands that and the jury will understand that.

A. I don't mean to offend you.

Q. Please, can you tell me what you said to Mr. Kay and what he said to you during that first conversation.

A. "I can't believe you're calling me, you no good son – fucking son of a bitch," or something like that.

Q. Can you tell us why you had such a response to Mr. Kay?

(p. 17) A. Yes.

Q. Would you tell us.

A. The lead singer of the newly constituted Van Halen was a gentleman by the name of Sammy Hagar. And I had done two tours prior to him joining Van Halen. Mr. Kay had agree to – at Cobo Hall, to promote Sammy Hagar individually.

I, in order to give him the best chance of being successful on that date, rerouted my tour to allow him a Saturday date, which historically Friday, Saturday nights are the best nights for concerts. And with – turned down a lot of money at another facility in another city in order to accommodate him.

And prior – after he agreed to do the date, he changed his mind and decided he would not promote the date. Which frankly, we deal in this business with one's word, and it infuriated me.

Therefore, I was not feeling very friendly to Mr. Kay, and hadn't for those couple years after he did that.

Q. After you made this comment to Mr. Kay that you just related, did he respond during this first phone conversation?

A. Yeah. He said, "Look, I can understand how you feel, and I know we've had a – an acrimonious" – I (p. 18) don't think he used that word, but that's what he implied – "relationship. And – however, I can make your band a lot more money than if you play with Cellar Door, so I'd like to come out and see you."

Q. Did he?

A. Yes, he did. But only after I had said to him that "If you're talking about $10,000, take it and shove it up your ass. I don't want to do business with you."

And he said, I'm "talking about considerably more amount of money than that."

And I said, at that point, "I have - look, I guess I'm going to have to see you because I have responsibility to my band to at least listen to that," even though my personal feelings were such that I would prefer not to play for him.

Q. And did he, in fact, come out to Los Angeles to meet with you at your office?

A. Yes, he did.

Q. Do you remember what type of time span elapsed between that phone conversation and this trip to Los Angeles?

A. Not really.

Q. Days, weeks?

A. Within a month. May have been two weeks. I don't remember.

(p. 19) Q. Okay. Who was present during your meeting with Mr. Kay in Los Angeles besides yourself and Mr. Kay?

A. Just he and I.

Q. And do you recall where that took place, that meeting?

A. Excuse me?

Q. Do you recall where that meeting took place?

A. Right here.

Q. In your office, where we are today?

A. Mm-hmm.

Q. What did Mr. Kay say to you and what did you say to him, sir?

A. He laid out an offer to me that was substantially better than anything I could – had received from Cellar Door.

Q. Did he explain how he could make such an offer?

A. He did say that he had an arrangement with the building that made it impossible for anyone else to get – offer me as good a deal.

Q. Do you have a recollection – I know it's a while ago, Mr. Leffler, of what that offer was?

A. Well, in order to – he made an offer, because he clearly didn't want me – which I understood and I didn't blame him either, to – nor did I ask – he made (p. 20) what we call a gross offer, percentage offer of the gross dollars, as opposed to what our normal deal was, where we would make X percent after expenses were deducted. And in comparing the two, there was no choice.

Q. When you say "comparing the two, there was no choice" –

A. Comparing the offer from Cellar Door and from Brass Ring, there was no choice as far as what was in the best interests of my band.

Q. Do you recall, Mr. Leffler, going back to Cellar Door and seeing if they could meet that offer, or anything of that nature?

A. I didn't ask them to meet the offer, as such. I told them that this was the offer I had received, and that I felt I probably was going to have to do the deal with Brass Ring.

Q. Who did you have that conversation with at Cellar Door?

A. Jack Boyle.

Q. And did he respond in any way?

A. Yeah. When I told him what the offer was, he said, "I don't blame you. You should take that offer."

Q. Mr. Leffler, had Cellar Door matched the Brass Ring offer that Rick Kay gave to you, for whom would you have advised your band, Van Halen, to pay on that tour, (p. 21) May 1986, Joe Louis Arena?

Mr. HARNISCH: Objection. Lack of foundation, calls for speculation and conclusion.

MR. KRAMER: You have a continuing objection.

THE WITNESS: There is no speculation involved. I would clearly have told them to – I would have advised them to play for Cellar Door, especially since Cellar Door promoted Van Halen in the past in Detroit, or in the recent past.

And also because Cellar Door had promoted – when Mr. Kay reneged on his date – Cellar Door came in and

promoted the next two tours for Mr. Hagar. So there would have been absolutely no speculation. It would have been Cellar Door.

MR. KRAMER: No further questions. Thank you, Mr. Leffler.

EXAMINATION

BY MR. NOVAK:

Q. Mr. Leffler, my name is Michael Novak, and I represent several of the co-defendants in this case, including Rick Kay, Robert Fox, Charles Forbes, Prophet Productions Limited, Michael Tinik, Vincent Bannon, and The Building Group.

I'd like to ask you a few questions about the

* * *

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC., OF MICHIGAN,

Plaintiff,

v.

RICK KAY, et al.,

Defendants.
_______________/

CIVIL ACTION NO. 87 CV 70397 DT

DEFENDANTS' KAY, FOX AND TINIK MOTION FOR SUMMARY JUDGMENT

DEFENDANTS' OLYMPIA, CAVALIERI AND ILLITCH MOTION FOR SUMMARY JUDGMENT

DEFENDANT CITY OF DETROIT'S RENEWED MOTION FOR DISMISSAL

PROCEEDINGS HAD in the above-entitled matter before the Honorable *ANNA DIGGS TAYLOR*, United States District Judge of the Eastern District of Michigan, Southern Division, at 737 U.S. Courthouse and Federal Building, 231 Lafayette Boulevard West, Detroit, Michigan, on Monday, October 19, 1987.

APPEARANCES:

STEVEN KRAMER, ESQ.,
STEVE J. WEISS, ESQ.,
On behalf of Plaintiff.

T. PATRICK FREYDL, ESQ.,
On behalf of Defendants Kay, Fox, Forbes, Prophet Productions, Tinik, Bannon, and The Building Group.

ALAN C. HARNISCH, ESQ.,
On behalf of Defendants Cavalieri, Illitch and Olympia.

CHARLES A. MOORE, ESQ.,
On behalf of Defendant City of Detroit.

* * *

(p. 18) *Car Carrier* was decided on a stipulated dismissal with prejudice or whether it was under a Rule 56 motion.

But, be that as it may, the point is that for purposes of *res judicata* as opposed to what he's saying, which is for purposes of collateral estoppel, a dismissal with prejudice satisfies *res judicata*. That I am absolutely unequivocally convinced of.

And what has happened time and time again is that where there is – as the court said in *Harkin versus Nance*, and *Ford versus Car Carrier*, and even I believe it was Judge LaPlata in the *Gurowski* case here, that the continuation of that conduct which has been deemed to be lawful has been held to be within the transactional definition of a claim, and therefore, if there was a dismissal on the merits –

THE COURT: Well, this Court didn't deem it anything. It hasn't been deemed lawful.

MR. FREYDL: I'm sorry. I can appreciate that.

THE COURT: This Court has a voluntary dismissal with prejudice, and that's the basis of my rulings.

MR. FREYDL: Yes, ma'am. And that's exactly right, it was a voluntary – and that satisfies *res judicata*. It does

not – and I agree with counsel, it does not satisfy collateral estoppel.

That is, if you have issues that are joined that are identical but come under different causes of action,

* * *

(p. 24) THE COURT: I think you're mixing apples and oranges, because the conduct hasn't been adjudicated lawful, you see.

MR. FREYDL: Well, the effect of the dismissal with prejudice is to give it the same effect for purposes of adjudication as to make it lawful conduct since it gave the defendant, as the court has said, every possible benefit of an adjudication by a jury. That was the effect of the dismissal with prejudice.

THE COURT: All right. Thank you.

The Court is going to grant the defendants' Fox, Tinik and Kay motion for summary judgment on the basis of the doctrine of *res judicata*. The first action between these parties or their privies was decided on the merits. A voluntary dismissal with prejudice was entered by this Court in November of 1983. The matters contested in the second action were decided by the first dismissal with prejudice, and are identical today. They concern an exclusive lease agreement between defendant Prophet Productions, d/b/a Brass Ring, Olympia Stadium and Olympia Arena, which was alleged to have denied plaintiff access to Cobo Hall and Joe Louis Arena, and in which the plaintiff claims to have been charged discriminatorily high rental rates.

* * *

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN, a Michigan corporation,

Plaintiff

-vs-

OLYMPIA STADIUM CORPORATION, a Michigan corporation; OLYMPIA ARENAS, INC., a Michigan corporation; and PROPHET PRODUCTIONS, LTD., a Michigan corporation,

Defendants

_______________/

Honorable
Anna Diggs Taylor

Case No.
83-CV-2560-DT

Howard E. O'Leary (P-18461)
Jeffrey M. Lipshaw (P-30713)
Attorneys for Plaintiff

T. Patrick Freydl (P-13705)
Attorney for Defendant Prophet Productions, Ltd. only

James R. Lites (P-29265)
Richard A. Solomon (P-20777)
Attorneys for Defendants Olympia only

AFFIDAVIT OF ROBERT A. FOX, PRESIDENT OF PROPHET PRODUCTIONS d/b/a BRASS RING PRODUCTIONS IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

STATE OF MICHIGAN)
) ss
COUNTY OF OAKLAND)

ROBERT A. FOX, being first duly sworn, deposes and states as follows:

1. That he is the President of Brass Ring Productions which is the trade name of PROPHET PRODUCTIONS, LTD. one of the Defendants in the above entitled action.

* * *

11. . . . Accordingly, it was agreed that Brass Ring with its promotional expertise and experience would participate in an experiment with the Olympia Organization which was specifically applicable to the Pine Knob season (in order not to jeopardize the regular rental schedules observed during the winter season). Thus, by its terms it was finally agreed that Brass Ring would attempt to co-promote with the Olympia Organization on an *ad hoc* basis for particular acts which were targeted to be inticed into the downtown facilities which acts would otherwise appear at Pine Knob for the handsome financial take-outs offered by the Nederlander Organization. It was decided that either party would have the option to participate or not participate based upon the merits of each individual proposed event.

12. In this specific regard during January and February of 1983, Brass ring tendered initial offers to various agencies for acts which traditionally play the Pine Knob Music Theatre and which would be touring during the summer of 1983. Because the Olympia facility was in essence co-promoting each particular project with Brass

Ring, Brass Ring was able to offer a competitive alternative to Pine Knob. The so-called arrangement with the Olympia Organization is nothing more than a loose agreement to structure offers to a specific act on flexible terms. It is not exclusive nor permanent.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CELLAR DOOR PRODUCTIONS, INC. OF MICHIGAN, a Michigan corporation

Plaintiff,

vs.

RICK KAY, ROBERT FOX, ROBERT CAVALIERI, CHARLES FORBES, MICHAEL ILITCH, OLYMPIA STADIUM CORPORATION, a Michigan corporation; OLYMPIA ARENAS, INC., a Michigan corporation; PROPHET PRODUCTIONS LTD., a Michigan corporation, MICHAEL TINIK, VINCENT BANNON, and THE BUILDING GROUP, CITY OF DETROIT,

Defendants.
________________________________/

Case No. 87-CV-70397DT

Hon. Patrick J. Duggan

* * *

ANSWER TO COMPLAINT AND AFFIRMATIVE DEFENSES

* * *

12A. Answering paragraph 12(a) of the Complaint, the Defendants deny that OAI has entered into a joint venture with BRASS RING. Rather, in late 1982, OAI and BRASS RING decided to jointly promote musical events in order to compete with Pine Knob during the summer, 1983 season. Their agreement has only been used in a limited fashion and it has been on a event by event basis with no agreement to continue for any length of time. Further, there is no agreement for exclusivity of use at either Joe Louis Arena or Cobo Arena, and no agreement that OAI would refuse to co-promote with others.

* * *